S. HRG. 99-793

ADMINISTRATIVE LAW JUDGE CORPS ACT S. 673

HEARING

BEFORE THE

SUBCOMMITTEE ON
ADMINISTRATIVE PRACTICE AND PROCEDURE

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

S. 673

A BILL TO ESTABLISH A SPECIALIZED CORPS OF JUDGES NECESSARY FOR CERTAIN FEDERAL PROCEEDINGS REQUIRED TO BE CONDUCTED, AND FOR OTHER PURPOSES

MAY 13, 1986

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S521-83

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ADMINISTRATIVE LAW JUDGE CORPS ACT
S. 673

TUESDAY, MAY 13, 1986

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE
AND PROCEDURE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:10 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Howell Heflin, presiding.

Also present: Senator Specter.

Staff present: Samuel J. Gerdano, counsel; Peggy Mainor, minority counsel, Subcommittee on Courts; Edward Merkle, legislative aide, Subcommittee on Administrative Practice and Procedure; and Jan Kovarick, staff assistant.

OPENING STATEMENT OF HOWELL HEFLIN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator HEFLIN [presiding]. I call this subcommittee to order.

Senator Grassley, who is the chairman of the subcommittee, has been called away, unexpectedly, to another appointment, so I will open the hearing in his absence; and we will place his opening statement in the record, as if read. In order to save time, I will place my opening statement in the record, as if read, and we will call on our witnesses.

[Senator Grassley's statement follows:]

OPENING STATEMENT BY SENATOR CHARLES E. GRASSLEY

I will call the subcommittee to order.

We are here this afternoon to renew our consideration of the concept of an administrative law judge corps.

My good friend and colleague on the subcommittee, Senator Heflin, has long been the leading spokesperson and advocate on this issue. He has introduced S. 673 as the 99th Congress version of the bill he sponsored in the 98th Congress. This concept was the subject of 2 days of subcommittee hearings in 1983. Today I hope we can establish a record on whether conditions have changed to warrant making this legislation a priority or whether the perceived problems can be better dealt with by other legislation.

It may be that the system "isn't broke" and "doesn't need to be fixed".

Although I'm sure my friend Senator Heflin will detail his bill better than I could, briefly I can say that this bill would create an independent corps of administrative law judges, independent from the agencies they now serve, and drawing from the existing pool of judges at federal agencies. All A.L.J.'s serving at the time of the creation of the corps would automatically be placed under its administration.

At the time the bill would take effect, seven distinct divisions would be created to reflect the specializations of many Federal departments and agencies that today have administrative law judges. The number of these divisions can increase to as many as 10, or be reduced to as few as three. The chief judges of these divisions, as well as the chief judge of the corps itself, would be appointed by the President, subject to the advice and consent of the Senate.

The proponents of a corps concept believe that substantial cost savings and efficiencies can result from combining A.L.J.'s into a single corps of judges. They also believe a corps furthers and protects the decisional independence of administrative law judges. I expect we will also hear some criticism of the corps concept.

I regret that my schedule this afternoon will not permit me to be present for much of the testimony. Too often, Senators have to be five places at once. It's important, however, that the testimony go forward.

Before I turn the hearing over to Senator Heflin, I will remind the witnesses that their complete written statement will be made a part of the record. Also, given the fact that subcommittee members such as myself will not be able to be here to ask questions directly, you will likely receive written questions from us in a day or so. We will keep the record open about two weeks to accept your written responses to these questions.

I'd like to take a minute to commend Senator Heflin for his tenacity on this issue. Senator Heflin is a most thoughtful member of this subcommitee. He has been in the vanguard of matters that enhance the stature of the judiciary. For this, we on the judiciary committee are in his debt.

At this point, I will yield to him for an opening statement and then turn over to him the conduct of our hearing this afternoon.

ATTACHMENTS

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20510

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LYNDA L. NERSESIAN, CHIEF COUNSEL AND STAFF DIRECTOR
ALICE R. MILDER, GENERAL COUNSEL

June 13, 1984

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
Washington, D.C. 20510

Dear Senator Thurmond:

I am writing to inform you that on Tuesday, June 12, 1984 the Subcommittee on Administrative Practice and Procedure completed action on two bills. The Subcommittee favorably reports S. 1275, Administrative Law Judges Corps, and S. 1839, Indemnification of Government Contractors to the Judiciary Committee.

I would appreciate having these bills placed on the agenda as soon as possible so that they may be reported to the Senate at the earliest possible date.

Enclosed are the polling forms indicating members' votes on these bills. Also enclosed are bill copies and summaries.

Thank you for your attention to this matter.

Sincerely,

Chuck

Charles E. Grassley
Chairman
Subcommittee on Administrative
Practice and Procedure

Enclosures
CEG:vg

U.S. Department of Labor

Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

10 JUN 1986

The Honorable Charles E. Grassley
Chairman, Subcommittee on Administrative
Practice and Procedure
United States Senate
Washington, D. C. 20510

Dear Senator Grassley:

This is in response to the June 4, 1986 letter addressed to you from Chief Judge John H. Fenton of the Federal Labor Relation's Authority. Judge Fenton forwarded a copy to me and I note that his letter confirms the substance of my testimony. However, the tenor of the letter and its implications require a response.

Judge Fenton admits that he did have a conversation with members of the Authority prior to assigning the PATCO case to himself and that Judge Vittone found that such activities could not be condoned. As the quoted portion of Judge Vittone's opinion suggests, the practice may conflict with 5 U.S.C. §3105 and raises questions of administrative fairness. Judge Fenton also acknowledges that he issued his already written decision in the case approximately four hours after briefs were filed. PATCO's failure to continue to contest this practice before the Court of Appeals in no way impacts upon my observation of this action's affect upon the public's perception of fairness. Apparently he wishes to relitigate the facts of a case which required an almost unprecedented inquiry into agency adjudications. Judge Fenton loses sight of the fact that it was his actions and not my testimony which created the spector of a situation that could not be condoned.

Regarding case dispositions and workloads, very little time was expended examining cases disposed of after trial. They are public records available at FLRA in the docket room and library. The practice of consolidating multiple docket numbers into one proceeding is certainly in the interest of judicial economy. When one is measuring output by the number of case dispositions, however, that indicator does not give a completely accurate picture of productivity. DOL could easily handle FLRA's caseload with half the budget for that office. At a minimum, if saving money in a tight budget year is an issue, FLRA cases should be heard by the NLRB.

In closing, I too would be disturbed if I were Judge Fenton. Occasionally the facts can be very unpleasant.

Sincerely,

Nahum Litt

NAHUM LITT
Chief Judge

NL:JMM:ajg

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

June 4, 1986

The Honorable Charles E. Grassley
Committee on the Judiciary
Chairman, Subcommittee on
Administrative Practice and Procedure
United States Senate
Washington, D.C. 20510

Dear Senator Grassley:

I am compelled by the seriously misleading statement of Chief Judge Nahum Litt to your Subcommittee on May 15, especially as it concerns my integrity as a Judge, to enter the following response, and to ask that it be made a part of your record concerning the establishment of an ALJ Corps.

A sense of regret unavoidably attends the effort to defend one's good name and reputation as a Judge against an errant accuser who is himself a Judge. In this instance it is tempered by a certain relish to do battle with one who is so recklessly unfair about very serious matters, and who has shown so little care and concern for accuracy in his presentation to the Subcommittee.

Judge Litt used FLRA as an example of untoward influence upon ALJs by their agencies. The fair import of his remarks about my involvement in the PATCO case is that:

(1) The Chairman requested that I hear that case, thus placing the Judge with "understanding" of the Chairman's needs in position as trier of the facts.

(2) The United States Circuit Court, based on these allegations, appointed a master (ALJ) who found the above to be the facts.

(3) However, a finding of improper influence was rendered unnecessary because the public perception of the fairness of the process had already received a mortal wound even before the ex parte communications were revealed, when I issued my previously written and duplicated decision within an hour or two of receiving briefs.

I think it necessary to correct Judge Litt line by line, so numerous and wanton are what might charitably be called his mistakes. Here we are fortunate, for there is an extensive and readily available record of the entire matter in the decision of the United States Circuit Court for the District of Columbia (685 F.2d 547), against which you can easily check the accuracy of his assault, and assess his sense of responsibility and his motives in leveling such serious charges in disregard of that record.

(1) The PATCO case had nothing to do, as he asserts, with improper removal of Air Traffic Controllers. It involved PATCO's right to represent them.

(2) I had no conversation with the Chairman about the selection of a Judge. I did have lunch with the other two Members of the Authority, as to which ALJ Vittone made findings. In his findings of fact, he concluded that those Members "urged Judge Fenton to assign a capable judge to the case and, if possible, to assign the case to himself" (685 F.2d 547, 619). In his discussion at page 620, he concluded that:

> On August 4, 1981, Members Frazier and Applewhaite met with Chief Administrative Law Judge John Fenton at lunch to discuss the procedural aspects of the PATCO case. During that discussion, it was suggested that Judge Fenton appoint a capable judge, preferably himself, to hear the PATCO case. No party has argued in its recommended findings that this luncheon meeting was improper. Further, I do not believe that it had any impact or effect on the FLRA's decision in the PATCO case. However, that finding does not mean that such practices should be condoned.
>
> It is clearly possible that the special selection or assignment of a judge to a particular case could raise substantial problems. There is no evidence that Judge Fenton's assignment of the PATCO case to himself raises any problems in this proceeding. However, the practice of agency heads suggesting that a particular judge be assigned to conduct a particular case should be avoided at the FLRA and all other federal agencies. Such a practice may conflict with 5 U.S.C. § 3105, and may raise questions of administrative fairness in those agencies which may attempt to influence the selection of a judge.

5 U.S.C § 3105 requires assignment of Judges in rotation so far as practicable.

(3) The Circuit Court did not appoint a master/ALJ based on allegations having to do with me. Rather, the Court, having been informed by the Justice Department that its Criminal Division and the FBI had investigated allegations of improper contact between a "well-known labor leader" and an Authority Member during the pendency of the PATCO case, ordered an "evidentiary hearing to determine the nature, extent, source and effect of any and all ex parte communications and other approaches that may have been made to any member or members of the FLRA" while that case was pending before it. (685 F.2d 547, 557). My discussion with the Members was revealed at that hearing, during examination of the Members by PATCO's attorney. As Judge Vittone noted, PATCO did not contend that this contact was in any way improper. Judge Vittone nevertheless scrupulously addressed the issue and found it conduct not to be condoned. As noted, he found no evidence that my having taken the case in the face of such a request raised any problem in that proceeding. I take him not to be condoning the request as opposed to criticizing me for hearing it.

Permit me here a personal observation, inasmuch as my integrity is at issue. I find a certain irony in Judge Vittone's approach. He questioned the propriety of a contact which might affect the required assignment in rotation and "raise questions of administrative fairness in those agencies which may attempt to influence the selection of a judge". That scrupulousness in addressing conduct not found offensive by the parties was admirable. But it may have deserted him when he made findings about me without even letting me know that my conduct was in issue and providing me with an opportunity to testify. In fairness to him, he may have thought it unnecessary because he did not fault me. My recollection differs from that of Member Frazier, whose testimony forms the basis for Judge Vittone's finding. I recall that Mr. Frazier, understandably anxious that the Authority acquit itself well in response to a nationwide airline strike, did ask that I appoint a capable Judge. He then smiled, seeing the latent humor in his request, and said that the use of the word capable was not intended to exclude me. We laughed. I certainly did not take his words as an attempt to instruct me to assign myself. Nor, in my 14 years as an ALJ (all as Chief or Associate Chief) have I ever been personally aware of any effort by any agency official to intrude upon the independence of a Judge. Certainly FLRA officials have been absolutely scrupulous in this respect.

(4) Judge Litt's statement that a finding of improper influence was rendered unnecessary because I had already dealt a mortal wound to the public's perception of a fair proceeding by having my decision prepared for issuance upon receipt of the briefs, is simply wrong. Judge Vittone, as already indicated, found the contact had no effect upon the decision. More importantly, the United States Circuit Court found, at page 575:

> Moreover, the facts of this case are free from any arguable taint. The extensive inquiry revealed no improper attempts to influence Chief ALJ Fenton or his fact-finding. The FLRA did not alter his factual conclusions. (underscoring mine).

The Court did, in a sense, address the matter of my very prompt issuance of my decision (page 554). Thus, it noted that PATCO had excepted to my decision on the ground that I "failed to give reasoned consideration to its brief". It noted that FLRA rejected that argument because my "Decision did address the arguments raised in PATCO's brief (despite a period of only four hours between the filing . . . and the issuance)", and that PATCO did not renew that argument before the Court.

The Court otherwise found no merit to any of the arguments about the fairness of the manner in which I handled the case. I of course, make no apologies for dealing with a case of such moment as quickly as I responsibly could. I am proud of that achievement. There was no real dispute over the facts, and the legal arguments were easily anticipated. My decision was, indeed, ready to go in the event that briefs failed to raise issues I had not already covered to the best of my ability.

In sum, it is clear that a Chief Judge has deliberately disregarded the findings of a United States Circuit Court of Appeals in his testimony before your Subcommittee because those findings conflict with his purposes. One can speculate on what overriding ambitions and personal agendas might explain such conduct in the face of an easily ascertainable public record which reveals his very grave accusations to be falsehoods. Should the Subcommittee be tempted to give serious consideration to his views on the need for a Corps and the claimed inadequancies of the present system, it is imperative that it consider those agendas and his demonstrated willingness to mislead it in order to advance them, as it weighs his testimony about other agencies.

The burden of Judge Litt's remarks about my caseload seems to be that it has been consistently "over estimated" (sic) and, in fact, misrepresented to the Congress. It should first be noted that the "depositions (sic) after hearing" which he notes are not simply "caseload", i.e., the amount of work we receive. They are, as estimates, a prediction of the number of decisions which a given number of Judges can write, with whatever consequences that will have on backlog and timeliness of decisions. As he notes, the 1985 Budget Request estimate for such decisions was 191. That projection was made in December of 1983 in an attempt to forecast two years ahead. In the following year (1984) that was revised to 154, based essentially on a sharp increase in the settlement rate and a drop in complaints. Thus the 191 forecast was associated with 688 other cases in which I anticipated settlement, and the 154 decisions were associated with 704 cases which I expected would be settled on the basis of an improving settlement performance. The decline of cases disposed of was from 877 to 848. I saw no need to reduce the number of Judges given the ample backlog to be worked and the uncertainties of the future, which included the likely loss of Judges.

Litt also says that our FY 86 budget submission indicated actual disposition of 162 cases after hearing, whereas a docket survey indicated 137 such decisions. Aside from noting that those 162 decisions are eight more than I had predicted the year before, the discrepancy he finds, but did not inquire about through his staff member who made his count, arises from my two systems of counting the decisional product. Cases are counted, by case number, as the General Counsel prepares to issue complaints and seeks docket space. They must be counted the same way - by case number - as they leave the system if my books are to balance. Each case number is therefore counted as a decision even though they may have been consolidated for hearing and issue in one "decision" or document. I also count by documents. In 1985 we issued 162 cases by number and 140 (not 137) by document.

In terms of my capacity to help Litt, which is what his undertaking in this respect is allegedly about, I would make two points. First, though he has expended considerable DOL resources in an effort to determine how many Judges I need (in an area of which he is unusually ignorant), he has never discussed the matter with me, and he has never requested help from me. Second, although my caseload has declined, one ALJ left in February of 1985 and another last month. He knows this, and knows he is beating a dead horse for other purposes.

I would also make several general points about matters within my experience. (Unlike Litt, I try to confine my serious remarks to matters within my competence). Litt attempts to rate the difficulty of cases at the NLRB and here. I spent over 20 years at NLRB, leaving the post of Assistant General Counsel to become Associate Chief ALJ at DOL for eight years. I know well the work of DOL, including Black Lung. His characterization of "most" work at NLRB as routine is, apart from his motives, simply silly. The range of case law to be understood and applied in labor cases, and the caliber of counsel encountered, makes most DOL work trivial in comparison. The latter can often be disposed of by formula. A look at the volume of Labor Board vs Labor Department cases which receive the attention of the Courts, and the many and sharp splits among the Circuits in Board cases attest to the vast difference in their complexity.

Finally, I would note that it is evident that Litt spends considerable DOL resources monitoring the work of other agencies, under the guise of demonstrating the presence of available manpower elsewhere, but, one must suspect, in the self-aggrandizing effort to become Super Judge over the Corps. This, and his spirited defense of the EPA ALJ's*/ use of government time and resources on the affairs of ALJ professional associations suggests that he sees no limit to such expenditure of agency appropriations except those imposed by the conscience of the individual Judge, whatever its impact on that agency's work.

Respectfully,

John H. Fenton

John H. Fenton
Chief Administrative Law Judge

---

*/ Note that his treatment of this matter, one of seven examples of "Direct and obtuse, if not clearly improper occurrences (which) are, and have been rampant" contains no slight suggestion that the investigation of that Judge's conduct is based on any consideration tied to her judicial independence. The author is indeed obtuse as to the purpose of this example.

U.S. Department
of Transportation
**United States
Coast Guard**

Commandant
United States Coast Guard

Washington, DC 20593
Staff Symbol:
Phone:

The Honorable Charles Grassley
Chairman, Subcommittee on Administrative Practice
and Procedure
Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Senator Grassley:

The Coast Guard would appreciate the inclusion of this letter in the record of the May 13, 1986, hearing of your Subcommittee on S. 673, a bill

> "To establish a specialized corps of judges necessary for certain federal proceedings required to be conducted."

We are concerned with the testimony of the Honorable Nahum Litt, the Chief Judge at the Department of Labor, specifically its remarks concerning the Chief Judge at the Coast Guard.

This testimony stated: "The Chief Judge at the Coast Guard currently drafts, or reviews for the Commandant, all decisions of his own judges on appeal." This statement creates a misimpression concerning administrative practice in the Coast Guard. The Chief Judge does not draft decisions on appeal to the Commandant. Drafting decisions on appeal is a function reserved to the Chief Counsel of the Coast Guard by regulation. The Chief Judge merely acts as an adviser to the Chief Counsel on these matters.

Briefly, Coast Guard administrative law judges hear cases involving the suspension and revocation of merchant mariners' documents, licenses, and certificates under 46 U.S. Code Chapter 77. Regulations for the suspension and revocation procedures are at 46 CFR Part 5. The law provides for appeals of these administrative law judges' decisions to the Secretary of the department in which the Coast Guard is operating, who has delegated this authority to the Commandant of the Coast Guard. The decision of the appeal is drafted by the Chief Counsel and is then presented to the Commandant for approval as the final administrative action on this matter. The Chief Judge advises, but does not exercise any authority over, the Chief Counsel during this process.

Thank you for your consideration of our views on this testimony.

Sincerely,

J. E. VORBACH
Rear Admiral, U.S. Coast Guard
Chief Counsel

[Senator Heflin's statement follows:]

PREPARED STATEMENT OF SENATOR HOWELL HEFLIN

~~MR. CHAIRMAN~~:

I WANT TO THANK ~~YOU~~ Senator Grassley FOR HOLDING THIS HEARING AND FOR ~~YOUR~~ his CONTINUED INTEREST AND LEADERSHIP IN THE REGULATORY REFORM AREA.

TODAY WE WILL RECEIVE TESTIMONY ON LEGISLATION DESIGNED TO INSURE THE INDEPENDENCE AND INTEGRITY OF OUR FEDERAL ADMINISTRATIVE SYSTEM. AN ADDED BENEFIT OF THIS LEGISLATION IN THIS ERA OF GRAMM-RUDMAN-HOLLINGS IS THE POTENTIAL TO SAVE MILLIONS OF DOLLARS THROUGH MORE EFFICIENT USE OF FEDERAL PERSONNEL.

ADMINISTRATIVE LAW JUDGES DECIDE DISPUTES BETWEEN INDIVIDUALS AND FEDERAL AGENCIES. OVER 1,100 ADMINISTRATIVE LAW JUDGES SERVE OUR FEDERAL SYSTEM -- MORE THAN TWO ALJS FOR EVERY FEDERAL DISTRICT COURT JUDGE. THE SCOPE OF AUTHORITY AND JURISDICTION OF THESE JUDGES IS STAGGERING. LAST YEAR, ADMINISTRATIVE LAW JUDGES DECIDED OVER 250,000 CASES. BY COMPARISON, FEDERAL DISTRICT JUDGES DECIDED JUST UNDER 200,000 CASES. ALJS LEVY FINES OF UP TO $100,000, AND RENDER DECISIONS TOUCHING NEARLY EVERY ASPECT OF OUR LIVES - FROM MINIMUM WORKPLACE SAFETY STANDARDS TO SOCIAL SECURITY CASES THAT CAN DETERMINE WHETHER FAMILIES MAKE ENDS MEET TO APPLICATIONS OF VITALLY IMPORTANT BUSINESS REGULATIONS. INDIVIDUALS AND BUSINESSes HAVE A RIGHT TO EXPECT THAT DISPUTES ARISING WITH ADMINISTRATIVE AGENCIES WITH SUCH A WIDE RANGE AND SCOPE OF POWERS WILL BE FAIRLY AJUDICATED IN AN ATMOSPHERE FREE OF BIAS. THE AMERICAN SYSTEM OF JURISPRUDENCE GUARANTEES AT THE VERY LEAST THAT JUDICIAL OFFICERS WILL BE FUNDAMENTALLY FAIR. THE MOST IMPORTANT ASPECT OF FUNDAMENTAL FAIRNESS IS THE MAXIM THAT JUDICIAL OFFICERS MUST BE FREE FROM ANY ASSOCIATION OR PERSONAL OBLIGATION TO ANY PARTY. TODAY'S TESTIMONY WILL

ESTABLISH IRREFUTABLY THAT A PROBLEM EXISTS NOT ONLY IN THE PUBLIC'S PERCEPTION OF AN ALJ'S INDEPENDENCE BUT IN MANY ALJS PERCEPTION OF THEIR OWN INDEPENDENCE. ALTHOUGH THE PROBLEM MANY NOT EXIST IN ALL AGENCIES, IT DOES EXIST IN QUITE A NUMBER OF THEM.

SEVERAL STATES HAVE ADOPTED AN INDEPENDENT CORPS CONCEPT, AND SUBSTANTIAL COST SAVINGS AND INCREASED EFFICIENCY have ~~HAS~~ BEEN ACHIEVED. BUT MORE IMPORTANTLY, EACH STATE HAS WITNESSED IMPROVED PUBLIC PERCEPTION OF ADMINISTRATIVE LAW JUDGES AS MEMBERS OF A TRULY INDEPENDENT AJUDICATIVE BODY. I BELIEVE THE FEDERAL GOVERNMENT CAN BENEFIT FROM THE LABORATORY OF STATE EXPERIENCE AND ADOPT THE BEST OF THESE IMPROVEMENTS. THIS IS THE third ~~SECOND~~ HEARING THE SUBCOMMITTEE HAS HELD ON THE CORPS CONCEPT AND A SUBSTANTIAL RECORD ON THE SUCCESS OF THESE STATE EXPERIMENTS HAS BEEN BUILT. I BELIEVE WE HAVE WITH US TODAY THE ACTING DIRECTOR OF THE INDEPENDENT CORPS FOR THE STATE OF NEW JERSEY AND I WELCOME HIM AND HIS SUGGESTIONS.

S.673 WILL PROVIDE FOR SIGNIFICANT COST SAVINGS, PRESERVATION OF EXPERTISE, MERIT SYSTEM SELECTION AND IMPROVED PUBLIC PERCEPTION OF THE INTEGRITY OF OUR FEDERAL SYSTEM. I LOOK FORWARD TO THE TESTIMONY OF ALL OF OUR DISTINGUISHED WITNESSES TODAY, SOME OF WHOM TESTIFIED AT OUR LAST HEARING. WE WILL BE HEARING FROM REPRESENTATIVES OF THE ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE, AND THE FEDERAL BAR ASSOCIATION. IN ADDITION, A NUMBER OF LETTERS SUPPORTING S.673 FROM A VARIETY OF CONSTITUENT GROUPS HAVE BEEN RECEIVED, OR ARE ON THE WAY AND I WILL ASK AT THIS TIME THAT THESE BE MADE A PART OF THE RECORD.

THANK YOU MR. CHAIRMAN.

II

99TH CONGRESS
1ST SESSION

S. 673

To establish a specialized corps of judges necessary for certain Federal proceedings required to be conducted, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 14 (legislative day, FEBRUARY 18), 1985

Mr. HEFLIN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To establish a specialized corps of judges necessary for certain Federal proceedings required to be conducted, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Administrative Law Judge Corps Act".

ESTABLISHMENT OF ADMINISTRATIVE LAW JUDGE CORPS

SEC. 2. Title 5, United States Code, is amended by redesignating subchapter III of chapter 5 as subchapter IV and by inserting a new subchapter III to read as follows:

"SUBCHAPTER III—ADMINISTRATIVE LAW JUDGE CORPS

"§ 561. Definitions

"For the purposes of this subchapter—

"(1) 'agency' means an authority referred to in section 551(1) of this title;

"(2) 'Corps' means the Administrative Law Judge Corps of the United States established under section 562 of this title;

"(3) 'administrative law judge' means an administrative law judge appointed under section 3105 of this title on or before the effective date of the Administrative Law Judge Corps Act or under section 567 of this title after such effective date;

"(4) 'chief judge' means the chief administrative law judge appointed and serving under section 563 of this title;

"(5) 'Council' means the Council of the Administrative Law Judge Corps established under section 565 of this title;

"(6) 'Nomination Commission' means the Judicial Nomination Commission for the Administrative Law Judge Corps established under section 566 of this title;

"(7) 'Board', unless otherwise indicated, means the Complaints Resolution Board established under section 569 of this title; and

"(8) 'division chief judge' means the chief administrative law judge of a division appointed and serving under section 564 of this title.

"§ 562. Establishment; membership

"(a) There is established an Administrative Law Judge Corps consisting of all administrative law judges, and such Corps shall be located at the seat of Government.

"(b) An administrative law judge serving as such on the date of the commencement of the operation of the Corps shall be transferred to the Corps as of that date. An administrative law judge who is appointed on or after the date of the commencement of the operation of the Corps shall be a member of the Corps as of the date of such appointment.

"§ 563. Chief administrative law judge

"(a) The chief administrative law judge shall be the chief administrative officer of the Corps and shall be the presiding judge of the Corps. The chief judge shall be nominated as prescribed in section 566 of this title and shall be appointed by the President, by and with the advice and consent of the Senate. The chief judge must be an administrative law judge who has served as an administrative law judge for at least five years preceding the date of appointment as chief judge. The chief judge shall serve for a term of five years or until a successor is appointed and qualifies to serve. A chief judge may be reappointed upon the expiration of his term, by and with the advice and consent of the Senate, if nominated for reappointment in accordance with section 566 of this title.

"(b)(1) If the office of chief judge is vacant, the division chief judge who is senior in length of service as a member of the Council shall serve as acting chief judge until such vacancy is filled.

"(2) In the event that two or more division chief judges have the same length of service as members of the Council, such division chief judge who is senior in length of service as an administrative law judge shall serve as such acting chief judge.

"(c) The chief judge shall, within ninety days after the end of each fiscal year, make a written report to the President and the Congress concerning the business of the Corps during the preceding fiscal year. The report shall include information and recommendations of the Council concerning the future personnel requirements of the Corps. If the Council recommends the appointment of an administrative law judge to add a new position to the Corps, or to fill a vacancy caused by retirement, resignation, removal or death of such judge, the chief judge shall submit information substantiating the need for such appointment.

"(d) After serving as chief judge, such individual may continue to serve as an administrative law judge unless such individual has been removed from office in accordance with section 569.

"§ 564. Divisions of the Corps; division chief judges

"(a) The Corps shall have not more than ten and not less than four divisions. Each judge of the Corps shall be assigned to a division. The assignment of a judge who was an administrative law judge on the date of commencement of the operation of the Corps shall be made after consideration of the areas of specialization in which the judge has served. Each division shall be headed by a division chief judge who shall exercise administrative supervision over the administrative law judges assigned to such division.

"(b) Except as provided in subsection (a), and after the initial appointment of a division chief judge as provided in subsection (c), and the establishment of each division pursuant to this subsection, the number of divisions and the jurisdiction of each division shall be determined by the Council. Until changed by the Council, the divisions of the Corps shall be as follows:

"(1) Division of Communications, Public Utility, and Transportation Regulation.

"(2) Division of Health, Safety, and Environmental Regulation.

"(3) Division of Labor.

"(4) Division of Labor Relations.

"(5) Division of Benefits Programs.

"(6) Division of Securities, Commodities, and Trade Regulation.

"(7) Division of General Programs and Grants.

"(c)(1) Each division chief judge shall be nominated as prescribed in section 566 of this title. The first division chief judge of each division set forth in subsection (b) shall be appointed by the President, by and with the advice and consent of the Senate. After such initial appointments, each division chief judge shall be appointed by the chief judge, with the approval of the Council.

"(2) To be eligible for nomination and appointment as a division chief judge, an individual must have served as an administrative law judge for at least five years and should possess experience and expertise in the specialty of the division to which such person is appointed.

"(3)(A) Division chief judges shall be appointed for five-year terms except that of those division chief judges first appointed the President shall designate two such individuals to be appointed for five-year terms, three for four-year terms, and two for three-year terms.

"(B) If the number of divisions provided for under this subsection is increased, the initial appointment of a division chief judge to a new division shall be made for a term of no more than five years, such that the terms of no more than four of such division chief judges expire in any one year.

"(4) Any division chief judge appointed to fill an unexpired term shall be appointed only for the remainder of such predecessor's term, but may be reappointed as provided in paragraph (5).

"(5) Any division chief judge may be reappointed upon the expiration of his term if nominated for such appointment pursuant to section 566.

"(6) Any judge, after serving as division chief judge may continue to serve as an administrative law judge unless such individual has been removed from office in accordance with section 569.

"§ 565. Council of the Corps

"(a) The policymaking body of the Corps shall be the Council of the Corps. The chief judge and the division chief judges shall constitute the Council. The chief judge shall preside over the Council. If the chief judge is unable to be present at a meeting of the Council, the division chief judge who is senior in length of service as a member of such Council shall preside.

"(b) One half of all of the members of the Council shall constitute a quorum for the purpose of transacting business. The affirmative vote by a majority of all the members of the

Council shall be required to approve a matter on behalf of the Council. Each member of the Council shall have one vote.

"(c) Meetings of the Council shall be held at least once a month at the call of the chief judge or by a majority of the Council.

"(d) The Council is authorized—

"(1) to assign judges to divisions and transfer or reassign judges from one division to another, subject to the provisions of section 567 of this title;

"(2) to create or reconstitute divisions of the Corps or abolish any such division effective at the expiration of the term of the division chief judge for such division;

"(3) to appoint persons as administrative law judges and members of the Corps under section 567 of this title;

"(4) to file charges seeking adverse action against an administrative law judge under section 569 of this title;

"(5) subject to the provisions of subsection (e), to prescribe, after providing an opportunity for notice and comment, the rules of practice and procedure for the conduct of proceedings before the Corps, except that, with respect to a category of proceedings adjudicated by an agency before the effective date of the Administrative Law Judge Corps Act, the Council may not amend or revise the rules of practice and procedure prescribed by that agency during the two years following such effective date without the approval of that agency, and any amendments or revisions made to such rules shall not effect or be applied to any pending action;

"(6) to issue such rules and regulations as may be appropriate for the efficient conduct of the business of the Corps and the implementation of this subchapter, including the assignment of cases to administrative law judges;

"(7) to determine all other matters of general policy of the Corps;

"(8) subject to the civil service and classification laws and regulations, to select, appoint, employ, and fix the compensation of the employees (other than administrative law judges) that they deem necessary to carry out the functions, powers, and duties of the Corps and to prescribe the authority and duties of such employees;

"(9) to establish, abolish, alter, consolidate, and maintain such regional, district, and other field offices as are necessary to carry out the functions, powers, and duties of the Corps and to assign and reassign employees to such field offices;

"(10) to procure temporary and intermittent services under section 3109 of this title;

"(11) to enter into, to the extent or in such amounts as are authorized in appropriation Acts, without regard to section 3709 of the Revised Statutes of the United States (41 U.S.C. 5), contracts, leases, cooperative agreements, or other transactions that may be necessary to conduct the business of the Corps;

"(12) to delegate any of the chief judge's functions or powers with the consent of the chief judge, or whenever the office of such chief judge is vacant, to one or more division chief judges or to other officers or employees of the Corps, and to authorize the redelegation of any of those functions or powers;

"(13) to make suitable arrangements for continuing judicial education and training for judges of the Corps; and

"(14) to provide for the training of other employees of the Corps.

"(e) The Council shall select an official seal for the Corps which shall be officially noticed.

"§ 566. Judicial Nomination Commission

"(a) There is established a Judicial Nomination Commission for the Administrative Law Judge Corps. The Nomination Commission shall consist of five members selected as provided in subsection (b). The Nomination Commission shall submit the names of qualified nominees for appointment to the position of chief judge and positions as division chief judges.

"(b) Each of the following persons shall appoint one member to the Nomination Commission within thirty days after the effective date of the Administrative Law Judge Corps Act:

"(1) The chief judge of the United States Court of Appeals for the District of Columbia Circuit.

"(2) The chief judge of the United States District Court for the District of Columbia.

"(3) The Chairman of the Administrative Conference of the United States.

"(4) The President of the American Bar Association.

"(5) The President of the National Bar Association, Incorporated.

"(c)(1) The persons first appointed pursuant to paragraphs (1) and (2) of subsection (b) shall each serve for a term of three years.

"(2) The person first appointed pursuant to paragraph (3) of subsection (b) shall serve for a term of two years.

"(3) The persons first appointed pursuant to paragraphs (4) and (5) of subsection (b) shall each serve for a term of one year.

"(d)(1) Subject to the provisions of this subsection, a vacancy on the Nomination Commission shall be filled in the same manner as the original appointment. An officer or employee of the United States may be a member of the Commission. The Commission shall select one of its members to be the Chairman.

"(2) Any member appointed to serve an unexpired term which has arisen by virtue of the death, disability, retirement, or resignation of a member shall be appointed only for such unexpired term, but shall be eligible for reappointment.

"(3) Each person appointed pursuant to this section after the initial appointments made in accordance with subsection (c) shall be appointed for a term of three years.

"(e)(1) For the initial appointment of the chief judge or, in the event of a subsequent vacancy in such position prior to the end of the term of such judge, the Nomination Commission, within ninety days after the effective date of the Administrative Law Judge Corps Act or sixty days after notification by the acting chief judge that a vacancy has occurred, as the case may be, shall submit to the President for appointment a list of the names of three persons qualified to fill the vacancy.

"(2) Not less than sixty days before the term of the chief judge expires, the Nomination Commission shall submit to the President for appointment a list of the names of three persons, one of whom may be the incumbent chief judge, who are qualified to be the chief judge.

"(3) For the initial appointment of the division chief judges, the Nomination Commission, within ninety days after the effective date of the Administrative Law Judge Corps Act, shall submit to the President for appointment a list of the names of three persons qualified to fill such positions.

"(4) If there is a vacancy in a position of division chief judge, the chief judge shall notify the Chairman of the Nomination Commission within ten days after such vacancy occurs. Within sixty days after such notice, the Nomination Commission shall submit to the chief judge for appointment a list of the names of three persons qualified to fill the vacancy.

"(5) The President, by and with the advice and consent of the Senate, or chief judge, as the case may be, shall appoint judges pursuant to this subsection from the lists provided by the Nomination Commission. The President, or the chief judge, as appropriate, may, however, reject any list provided for any position and request that such Commission submit another list for any such position.

"(f)(1) A member of the Nomination Commission who is an officer or employee of the United States shall not receive additional compensation while serving as a member of such Nomination Commission. Other members of the Commission shall receive compensation at the daily equivalent of the rate provided for employees in grade GS–18 of the General Schedule, established under section 5332 of this title, for each day, including traveltime, he or she is engaged in the actual performance of his or her duties as a member of the Commission. A member shall not be deemed an officer or employee of the United States solely by reason of his or her service as a member of the Nomination Commission.

"(2) All agencies of the United States shall provide, to the extent allowed by law, to the Nomination Commission the assistance and facilities that the Nomination Commission requests, including access to records and other information pertaining to prospective nominees, to enable the Nomination Commission to perform its functions. Records and information so furnished shall be treated as privileged and confidential by the Nomination Commission.

"(3) Funds appropriated to conduct the general operations of the Corps may be expended to defray the expenses of the Nomination Commission.

"§ 567. Appointment and transfer of administrative law judges

"(a) After the initial establishment of the Corps, the Council shall appoint new or additional judges as may be necessary for the efficient and expeditious conduct of the business of the Corps. Appointments shall be made from a register maintained by the Office of Personnel Management under subchapter I of chapter 33 of this title. Upon request by the chief judge, the Office of Personnel Management shall certify enough names from the top of such register to enable the Council to consider five names for each vacancy. Notwithstanding section 3318 of this title, a vacancy in the Corps may be filled from the highest five eligible individuals available for appointment on the certificate furnished by the Office of Personnel Management.

"(b) A judge of the Corps may not perform or be assigned to perform duties inconsistent with the duties and responsibilities of an administrative law judge.

"(c) A judge of the Corps on the date of commencement of operation of the Corps may not thereafter be involuntarily reassigned to a new permanent duty station that is beyond commuting distance of the judge's permanent duty station on that date, unless the Council determines and submits a written explanation to the judge stating, that such reassignment is required to meet substantial changes in workloads. A judge may be temporarily detailed, once in a twenty-four-month period, to a new duty station, at any location, for a period of not more than one hundred and twenty days.

"§ 568. Jurisdiction

"(a) Except as provided in subsection (c), an administrative law judge who is a member of the Corps shall hear and render a decision upon—

"(1) every case of adjudication subject to the provisions of section 554 of this title;

"(2) every case in which hearings are required by law to be held in accordance with section 554 or section 556 of this title; and

"(3) every other case referred to the Corps by an agency or court in which a determination is to be made on the record after an opportunity for a hearing.

"(b) When a case under subsection (a) arises, it shall be referred to the Corps. Under regulations issued by the Council the case shall be assigned to an administrative law judge. Administrative law judges shall be assigned to cases within their division in rotation, so far as practicable.

"(c) Notwithstanding subsection (a) or (b)—

"(1) the agency, or one or more members of the body that comprises the agency, may hear the case and render the decision thereon in accordance with section 566 of this title; or

"(2) an agency may provide for omission of the decision of the administrative law judge in accordance with section 557(b)(2) of this title.

"(d) Federal agencies and courts are hereby authorized to refer to the Corps any other case where a determination on the record after an opportunity for a hearing by a judge of the Corps is found by such court or agency to be desirable and appropriate.

"§ 569. Removal and discipline

"(a) Except as provided in subsection (b) of this section—

"(1) an administrative law judge may not be removed, suspended, reprimanded, or disciplined except for misconduct, incompetence, or neglect of duty but may be removed or suspended for physical or mental disability; and

"(2) an action specified in paragraph (1) of this subsection may be taken against an administrative law judge only after the Council has filed a notice of adverse action against the administrative law judge with the Merit Systems Protection Board and the Board has determined, on the record after an opportunity for a hearing before the Board, that there is good cause to take such action.

"(b) Subsection (a) does not apply to—

"(1) the replacement or reassignment of a division chief judge as provided in section 565(d) of this title; and

"(2) an action initiated under section 1206 of this title.

"(c) Under regulations issued by the Council a Complaints Resolution Board shall be established within the Corps to consider and to recommend appropriate action to be taken upon complaints by any interested person including parties, practitioners, and agencies, against the official conduct of judges.

"(d) The Board shall consist of two judges from each division of the Corps appointed by the Council. The chief judge and the division chief judges may not serve on the Board.

"(e) A complaint of misconduct on the part of an administrative law judge must be made in writing. The complaint shall be filed with the chief judge, or it may be originated by the chief judge on his own motion. The chief judge shall refer the complaint to a panel consisting of three members of the Board selected by the Council, none of whom serves in the same division as the administrative law judge who is the subject of the complaint. The administrative law judge who is the subject of the complaint shall be given notice of the complaint and the composition of the panel. The administrative law judge may challenge peremptorily not more than two members of the panel. The Council shall replace a challenged member with another member of the Board who is eligible to serve on such panel.

"(f) The panel shall inquire into the complaint and shall render a report thereon to the Council. A copy of the report shall be provided concurrently to the administrative law judge who is the subject of the complaint. The report shall be advisory only.

"(g) The proceedings, deliberations, and reports of the Board and the contents of complaints under this section shall be treated as privileged and confidential. Documents considered by the Board and reports of the Board are exempt from disclosure or publication under section 552 of this title. Section 552b of this title does not apply to the Board.".

AGENCY REVIEW STUDY AND REPORT

SEC. 3. The chief administrative law judge of the Administrative Law Judge Corps of the United States shall make a study of the various types and levels of agency review to which decisions of administrative law judges are subject. A separate study shall be made for each division of the Corps. The studies shall include monitoring and evaluating data and shall be made in consultation with the division chief judges, the Chairman of the Administrative Conference of the United States, and the agencies that review the decisions of administrative law judges. Not later than two years after the effective date of this Act, the Council shall report to the President and the Congress on the findings and recommendations resulting from the studies. The report shall include recommendations, including recommendations for new legislation, for any reforms that may be appropriate to make review of administrative law judges' decisions more efficient and meaningful and to accord greater finality to such decisions.

TRANSITION AND SAVINGS PROVISIONS

SEC. 4. (a) There are transferred to the administrative law judges of the Administrative Law Judge Corps established by section 562 of title 5, United States Code (as added by section 2 of this Act), all functions performed on the day before the effective date of this Act by the administrative law judges appointed under section 3105 of such title before the effective date of this Act.

(b) With the consent of the agencies concerned, the Administrative Law Judge Corps of the United States may use the facilities and the services of officers, employees, and other personnel of agencies from which functions and duties are transferred to the Corps for so long as may be needed to facilitate the orderly transfer of those functions and duties under this Act.

(c) The personnel, assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available or to be made available, in connection with the functions, offices, and agencies transferred by this Act, are, subject to section 1531 of title 31, United States Code, correspondingly transferred to the Corps for appropriate allocation.

(d) The transfer of personnel pursuant to subsection (b) of this section shall be without reduction in classification or compensation for one year after such transfer.

(e) The Director of the Office of Management and Budget, at such time or times as the Director shall provide, may make such determinations as may be necessary with regard to the functions, offices, agencies, or portions thereof, transferred by this Act, and to make such additional incidental dispositions of personnel, assets, liabilities, grants, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds held, used, arising from, available to, or to be made available in connection with such functions, offices, agencies, or portions thereof, as may be necessary to carry out the provisions of this Act. The Director shall provide for such further measures and dispositions as may be necessary to effectuate the purposes of this Act, and for the termination of the offices and agencies specified in this Act.

(f) All orders, determinations, rules, regulations, certificates, licenses, and privileges which have been issued, made, granted, or allowed to become effective in the exercise of any duties, powers, or functions which are transferred under this Act and are in effect at the time this Act becomes effective shall continue in effect according to their terms until modified, terminated, superseded, set aside, or repealed by the Administrative Law Judge Corps of the United States or a judge thereof in the exercise of authority vested in the Corps or its members by this Act, by a court of competent jurisdiction, or by operation of law.

(g) Except as provided in subsections (d)(5) and (e) of section 565 of title 5, United States Code, this Act shall not affect any proceeding before any department or agency or component thereof which is pending at the time this Act takes effect. Such a proceeding shall be continued before the Administrative Law Judge Corps of the United States or a judge thereof, or, to the extent the proceeding does not relate to functions so transferred, shall be continued before the agency in which it was pending on the effective date of this Act.

(h) No suit, action, or other proceeding commenced before the effective date of this Act shall abate by reason of the enactment of this Act.

AUTHORIZATION OF APPROPRIATIONS

SEC. 5. There are hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act and subchapter III of title 5, United States Code (as added by section 2 of this Act).

TECHNICAL AND CONFORMING AMENDMENTS

SEC. 6. Title 5, United States Code, is amended as follows:

(1) Section 573(b) is amended by redesignating paragraphs (4), (5), and (6) as paragraphs (5), (6), and (7), respectively, and inserting a new paragraph (4) to read as follows:

"(4) the chief administrative law judge of the Administrative Law Judge Corps of the United States;".

(2) Section 3105 is amended to read as follows:

"§ 3105. Appointment of administrative law judges

"Administrative law judges shall be appointed by the Council of the Administrative Law Judge Corps pursuant to section 567 of this title.".

(3) Section 3344 and any references to such section are repealed.

(4) The table of sections for chapter 33 is amended by striking out the item relating to section 3344.

(5) The tables of contents of this title and of chapter 5 thereof each are amended by—

(A) redesignating subchapter III as subchapter IV; and

(B) inserting after the item relating to section 559 the following:

(6)(A) Subchapter III of chapter 75 of title 5, United States Code, is repealed.

(B) The table of sections at the beginning of chapter 75 of title 5, United States Code, is amended—

(i) by striking out the items relating to subchapter III and section 7521;

(ii) by striking out "Subchapter IV" and inserting in lieu thereof "Subchapter III"; and

(iii) by striking out "Subchapter V" and inserting in lieu thereof "Subchapter IV".

(7) Section 5314 is amended by adding at the end thereof the following:

"Chief Administrative Law Judge of the Administrative Law Judge Corps".

(8) Section 5315 is amended by adding at the end thereof the following:

"Division Chief Judges of the Administrative Law Judge Corps".

(9) Section 5316 is amended by adding at the end thereof the following:

"Administrative Law Judges in the Administrative Law Judge Corps.".

(10)(A) Section 5372 is repealed.

(B) The table of sections at the beginning of chapter 53 of such title is amended by striking out the item relating to section 5372.

"SUBCHAPTER III—ADMINISTRATIVE LAW JUDGE CORPS

"Sec.
"561. Definitions.
"562. Establishment; membership.
"563. Chief administrative law judge.
"564. Divisions of the Corps; division chief judges.
"565. Council of the Corps.
"566. Judicial Nomination Commission.
"567. Appointment and transfer of administrative law judges.
"568. Jurisdiction.
"569. Removal and discipline.".

OPERATION OF THE CORPS

SEC. 7. Operation of the Corps shall commence on the date the first chief administrative law judge of the Corps takes office.

CONTRACT DISPUTES ACT

SEC. 8. Nothing in this Act or the amendments made by this Act shall be deemed to affect any agency board established pursuant to the Contract Disputes Act (41 U.S.C.

601), or any other person designated to resolve claims or disputes pursuant to such Act.

EFFECTIVE DATE

SEC. 9. Except as otherwise provided, this Act and the amendments made by this Act shall take effect on the date of enactment.

○

Senator **Heflin**. Is Senator Pryor here? All right. Senator Pryor's statement will be placed in the record.

[The statement follows:]

PREPARED STATEMENT OF SENATOR DAVID PRYOR

I am pleased to have this opportunity to present testimony before this Subcommittee on issues related to the administrative independence of administrative law judges. I would like to commend Senator Grassley, the Subcommittee Chairman, for his role in scheduling this hearing, and Senator Heflin for his extensive work in this area. I regard Senator Heflin as one of the Senate's leading experts in judicial and administrative law matters, and his interest in securing the independence of federal administrative law judges is laudable.

My interest in this area began in 1981 with concerns over the manner in which the Social Security Administration was conducting the continuing reviews of disabled individuals. Over time it became increasingly clear that a significant number of truly disabled individuals were being removed from the disability rolls.

These unfair terminations resulted in a record number of benefit appeals to the administrative law judge level. My office began to hear of the Social Security Administration's setting of productivity goals and allowance rates for Social Security ALJs. ALJs were placed on "Bellmon Review" if their allowance rates were considered by SSA to be too high, and if this action did not produce the desired results, the SSA Office of Hearings and Appeals would call the ALJs to Washington for retraining, and harass them with phone calls and letters regarding allowance rates. All of these actions threatened the independence of the ALJ's decision, eliminated the claimant's right to a fair hearing, and thwarted the intent of the Administrative Procedures Act.

It became clear that, although comprehensive disability reform legislation was needed to prevent SSA from continuing to carry out its devastating policies with respect to disability reviews, it was just as necessary to ensure that administrative law judges reviewing Social Security cases were protected from undue pressures by the Social Security Administration. Only through reform in both of these areas could we be assured of equity and fairness throughout the entire review and appeals process for disability beneficiaries.

On September 30, 1983, and again on March 5, 1985, I introduced legislation designed to restore administrative independence for administrative law judges within the Department of Health and Human Services. Specifically, my bill (S. 580) would:

--Create the Health and Human Services Review Commission to hear and decide cases for the Department, but independent of the various components of DHHS responsible for administering their respective programs.

--Provide for five Commissioners-one serving as Chairman-appointed by the President for six-year terms with the advice and consent of the Senate, to constitute the Review Commission.

--Provide for the appointment and supervision of ALJs, in accordance with the Administrative Procedures Act, and other employees as required.

--Provide for the transfer, on the effective date of this act, of all ALJs and necessary employees from other components of DHHS to the Review Commission.

--Authorize the Review Commission to make such internal rules and procedural regulations as are necessary or desirable to the orderly transaction of its proceedings, subject to the APA, but providing for the application of existing procedural rules and regulations in the interim.

--Provide for remand authority by the Commission to other components of DHHS, as appropriate.

--Provide for review of ALJ decisions at the discretion of the Commission, but limited by substantial evidence rules.

--Provide for appeal, to the U.S. district court, by a party adversely affected by a decision of the Commission, within 60 days after such decision is issued, with the court applying the substantial evidence rules in its review of the Commission's decision.

Mr. Chairman, I believe that this legislation would go a long way toward establishing independence for administrative law judges within the Department of Health and Human Services, which comprise about 80 percent or so of the total ALJs in the United States. However, since introduction of my bill, I have been informed of other problems within the ALJ system which may require corrective action. I believe that Senator Heflin's legislation to create a unified ALJ corps may be a more comprehensive approach to dealing with the more pervasive problems of the administrative law judge system. However, I firmly believe that it is of great importance that the Congress act to eliminate the problems in the system, and offer whatever assistance I can provide to your committee.

Senator **Heflin**. Mr. Cynkar.

STATEMENT OF THE HON. ROBERT J. CYNKAR, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. **Cynkar**. Good afternoon, Senator. My name is Bob Cynkar and I am a Deputy Assistant Attorney General in the Civil Division and am here representing the Justice Department.

I do not intend to read the prepared remarks that we have submitted, but just would ask that they be included in the record.

Senator, it is a pleasure to be before the committee, not only in terms of representing the Justice Department on your legislation, but also, as an alumnus of the staff of the Regulatory Reform Subcommittee, this is my first opportunity to be before the Senate Judiciary Committee on this side of the table. It is a pleasure to be here.

As you know, the Justice Department has historically taken a position in opposition to the legislation that is before the subcommittee today, and it will be no surprise to you that that will be our position today.

What I would like to do briefly, in my remarks, and then in response to questions, is try to scope out our principled rather than practical objections to the legislation.

We feel that the proposals, both in your legislation and Senator Pryor's legislation, are based on a misconception of the role of the agency, and the administrative law judge process, basically it is a misconception that the ALJ is essentially, the "court of first resort," where citizens get their first fair shake at having their side of a dispute with an agency head.

And if you will bear with me for one moment, I would like to submit that that really is not how the process is designed to work. Our objections, therefore, are based on the idea that what both you and Senator Pryor are proposing, really, is to take an orange and transplant it on an apple.

And the apple that we see in place now, as far as the administrative law process, is that the Congress establishes a policy, articulates a program, and gives an agency the discretion to run that program, whether it is the Social Security disability program, or the disbursement of any other sort of government benefit.

The agency head exercises that discretion that Congress has given by articulating and promulgating regulations, and in a more informal sense, policy statements, handbooks, manuals, all in accord with the various provisions of the Administrative Procedure Act.

It is then incumbent upon the agency head to decide, in particular instances, such as the granting of disability benefits—whether a particular person, given particular facts, should get those benefits that you and Congress want them to get. And it is there that the ALJ serves a unique function. It is not quite like a judge, but in so far as that ALJ is supposed to be, in a sense, the "conscience" of the agency, various steps have been taken to assure at least a certain amount of ALJ independence from the agency, those that you are familiar with and I will not recount them here.

But by the same token, because the ALJ is part of the agency—and this, in a sense, is the "shot" of the agency to make a fair decision about whether an individual should get those benefits—the ALJ does not have some of the more familiar points of independence that a regular article 3, or even an article 1 court judge has, such as ruling on questions of the legality of regulations; whether they comport with the underlying statute. Moreover, the ALJ can be overruled by the agency head to which he is reporting, or advising. So there is both an identity between the ALJ and the agency, and a bit of separation.

Now, based on that, it is our view that the proposal to give ALJs more independence by putting them all in a corps suffers from several problems.

First of all, the greater independence that would be given to ALJ's disrupts this unique ALJ relationship to the agency. This position of the ALJ is, in essence, the "conscience of the agency," as the agency itself, in the person of the ALJ, is deciding about a particular person's rights to benefits that Congress has provided. The ALJ is not intended to be an outside, neutral arbiter. In that respect, to increase ALJ independence, is almost as if the concept of separation of powers is being inserted within the executive branch itself, and sort of fracturing decisionmaking within the executive branch.

I suppose the proposal has two alternative problems, depending upon how you look at it. First of all, if you view it as "the shot" that the agency has to review a particular person's case, it is really taking away the ability of the agency itself to see whether this particular claimant should get those benefits.

If you do not view it as that, but if you view it more from the conception that this is the claimant's sort of, "first day in court," what you are essentially doing is interjecting another judicial layer between the agency and article 3 courts.

In addition, we see some practical problems. The way the system is conceived now, the ALJ is supposed to be exercising that same expertise that the agency has in reviewing these claims. By dishursing ALJ's into a corps and having them serve different agencies on a different basis, you lose that expertise.

In addition I would suggest something that, perhaps from my prior Hill perspective I see, and really has not been noted before in some of the hearings. As you increasingly judicialize a process, you decrease the ability of an agency to respond more promptly to the policy guidance from Congress. If, for example, the Social Security Administration, or any particular agency, has put into place regulations, or a policy manual, or whatever, that many Members of Congress feel does not really accord with what Congress intended in a particular statute, outside of an individual claimant challenging those regulations, or handbook, whatever, in the courts, Congressional oversight hearings can be held.

And agencies, as you probably know better than I, really jump when the Congress is interested in what they are doing. So, I think that pulling ALJ's out has the additional disadvantage of increasing another layer of judges and decreasing responsiveness to the Congress.

By the same token, some of the arguments that have been made in favor of the ALJ corps do not appear to have substantial evidence supporting them.

There are often generalized conclusions of unfair treatment and I certainly do not come here to say that by no means is there unfair treatment. I do not have any evidence on which to base such a conclusion. Indeed, there is not a good record on evidence of unfair treatment, or bias on the part of ALJ's. Where there is such a claim, claimants regularly raise that issue in court.

By the same token, there is a question of what economists, would call "transaction costs." Now you have the support at the secretarial and administrative level that individual agencies give to ALJ's. I think it is very unclear whether the centralized ALJ corps idea will make the process more efficient and will really allow the sort of speedy processing of claims that I think everyone is interested in.

Let me close on a perhaps more upbeat note, rather than giving such a litany of negatives. I would recommend that the subcommittee to take a broader look at the issue rather than merely just the question of ALJ formal rulemaking proceedings, or the individual independence of ALJ's.

I think that if one looks at the whole process of how government benefits are given, from the stage of an administrative proceeding before an agency, all the way through the court process, you see layers and layers and layers of review. I think one can legitimately come away wondering whether the claimants that have to be put through that process really benefit. For example, there are four layers of administrative process—including two at the State level—in SSA cases.

The resolution of a claim can take up to 1 year just in the administrative process, much less in the judicial process. I would recommend that the subcommittee at least consider something broader than the ALJ corps, to really consider whether some restructuring needs to be done. And if the initial proceeding that a claimant must confront needs to be more judicialized, maybe something on the order of an article 1 disability court, and not having administrative proceedings at all before the agency should be considered. Or just giving the agency one shot, which would not allow them to reconsider a claim might be the way to go.

An appeal could be allowed from the article 1 court directly to the circuit courts of appeals, rather than to the district court, to ensure not only a fair day in court and a fair resolution for claimants, but also speedy justice for claimants, which is really a considerable problem now.

I see my time is up, and I really have ended my comments. I will be happy to answer any questions you might have.

[The statement follows:]

PREPARED STATEMENT OF ROBERT J. CYNKAR

Mr. Chairman and Members of the Subcommittee

It is a pleasure to be here today to discuss S.673, the Administrative Law Judge Corps Act and the broader question of how best to ensure the integrity and efficiency of the adjudicatory process under the Administrative Procedure Act. While we welcome Congress's interest in improving the effectiveness of the adjudicatory process, we do not think that this bill is an appropriate response to any shortcomings of that system.

S. 673 would radically alter federal administrative law by separating administrative law judges from the administrative agencies and departments in which they are currently employed and creating an independent administrative structure for the operation of the system of agency-level adjudication. Proposals similar to S. 673 have been advanced intermittently over the past fifty years,[1] but have consistently been rejected in favor of maintaining an agency-based system of administrative adjudication.

For reasons set forth in greater detail in the attached legislative report, the Department of Justice opposes enactment of S. 673. As an initial matter, there is no indication that the true independence of ALJs is being compromised, thus, we do not believe that the creation of an independent ALJ Corps is necessary to ensure fairness and public confidence in the system of administrative adjudication. Existing law incorporates a variety of measures that protect the impartiality of administrative law judges, including special arrangements relating to selection, tenure, and compensation, and separation-of-functions provisions which safeguard administrative law judges from control or influence by agency personnel with conflicting investigative or prosecuting functions.[2] There is no evidence of pervasive inadequacies in this system that would justify the separation of administrative law judges from all agencies that currently employ them.

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[1] *See* Marquardt & Wheat, *The Developing Concept of an Administrative Court*, 33 Ad. L. Rev. 301, 305-10 (1981); Lubbers, *A Unified Corps of ALJs: A Proposal to Test the Idea at the Federal Level*, 654 Judicature 266, 273 (1981).

We also find unpersuasive the argument that the creation of an ALJ Corps would improve the overall efficiency of administrative adjudication. The creation of such a Corps would terminate the sharing of facilities and support services that now takes place between administrative law judges and their employing agencies. There is no reason to believe that the resulting duplications and inefficiencies would be outweighed by economies realized through the creation of a unified Corps of administrative law judges.

A third concern we have with this proposal is that it is in conflict with a historic premise of our system of administrative law -- that expertise in specialized administrative areas is essential to prompt and informed decisions. The proposal of S. 673 would entrust the administrative hearings process arising under the programs of dozens of agencies to a separate Corps whose judges, sitting in broadly defined subject matter divisions, would not necessarily have substantial familiarity with the subject matter areas and operations of particular agencies. A change of this sort would predictably take its toll in increased burdens on litigants to "educate" non-specialized judges at the administrative level, increased processing time, inaccuracy and unpredictability in ALJ decisions, increased inconsistency which would fragment the process and increased burdens on administrative reviewers and reviewing courts in cases in which the hearing record was inadequate or the initial decision erroneous. A system in which administrative law judges were fungible within large groupings of agencies would accordingly sacrifice the characteristic strengths of administrative adjudication and would not, in our judgment, work nearly as well as the current system from a simple operational standpoint.

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[2] See generally 5 U.S.C. §§ 554, 556-57, 3105, 5372 and 7521.

A further concern raised by the proposed creation of an independent corps of administrative law judges is its effect on the implementation of agency policies. Within an administrative agency, ultimate responsibility for the resolution of questions of law and policy that arise under the agency's programs resides with the head of the agency.[3] The separation of administrative law judges from the agencies whose cases they hear would tend to cloud this fundamental principle of administrative law and produce increased problems of inconsistency between administrative law judges' decisions and the policies of the responsible agency head.

Finally, we find a number of features in the formulation of this proposal problematic. These include the re-constitution of the principal class of administrative adjudicators as a self-governing and self-selecting body with exclusive authority to control and judge the conduct of its members. Our objections on these points are fully set out in the attached report.

That concludes my prepared statement and I would be happy to answer any questions.

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[3] See, e.g., Attorney General's Manual on the Administrative Procedure Act 14-15, 55, 84 (Dept. of Justice 1947) Legislative History of the Administrative Procedure Act, S. Doc. No. 248, 79th Congress, 2d Sess. 210-11, 229, 262-63, 272-73 (1946); D'Amico v. Schweiker, 698 F.2d 903 (7th Cir. 1983).

Senator HEFLIN. I am going to give you a true/false test. The Department of Justice seldom, or never, appears before an administrative law judge. True or false? By this I mean a lawyer of the Department of Justice.

Mr. CYNKAR. Well, can I answer it broader than a yes or no?

Senator HEFLIN. Well, yes, I suppose. Of course I said "seldom," or "never."

Mr. CYNKAR. Well, Senator, I would say the answer is of course "no," and I know from reading prior testimony, that you have asked that question before, and as a trial lawyer, I suspect I am being impeached here.

But I would like to try to unimpeach myself, since I do not have counsel to rehabilitate my testimony on my own. It is certainly true, that we do not regularly appear before ALJ's. That is why, in my statement, I did not purport to say that I know for a fact that ALJ's are biased or unbiased, or what sort of "shake" an individual person gets in front of an ALJ.

However, the very part of the Civil Division that I supervise, the Federal Programs Branch, handles almost all of the main defensive litigation challenging agency actions, agency rulemakings, and so forth. So the issues of due process, at the administrative level, and so forth, are something that I am familiar with. By the same token, in trying to deal with some of these problems—for example, the crush of Social Security cases—many regions around the country feel that additional help for ALJ's, in terms of training, or a range of different steps to improve their work, is something that needs to be done, and we have helped by having our attorneys participate in seminars and lectures with ALJ's, and so forth.

So, the answer to your question is clearly "No," we do not appear before ALJ's as a matter of course; but I do not think that the thrust of your question, which is that therefore we do not have an informed opinion to at least advise the subcommittee, is accurate.

Senator HEFLIN. I gather that you are testifying that administrative law judges should not be considered comparable to trial judges in a court?

Mr. CYNKAR. That is correct.

Senator HEFLIN. Well, in the 1978 Supreme Court case of *Butz* v. *Economu,* the Court held administrative law judges to be "functionally comparable to trial judges," and stressed that they resolve the conflicts of an adversarial nature, every bit as fractious as those that come to court; comparable powers to issue subpoenas, rule on proffers of evidence, regular courses, hearings, make or recommend decisions. I believe that at least the Supreme Court and the Department of Justice differ on that position.

Mr. CYNKAR. Well, as perhaps you can expect, I would disagree. Not only does the Supreme Court say that, but the Administrative Procedure Act says that. That could be a paraphrase of the APA. I think it is important to look at the system from the beginning to the end—meaning from the agency deciding to grant or deny a benefit to a particular claimant, through the court process.

The question is not whether ALJ's are competent attorneys. Do they have challenging work? Do they make important decisions? That is not, I think, the point.

The point is, in terms of how we want to have the dispute resolution mechanism work, should they be essentially equivalent to article 3 judges, or, is the role that was conceived of for them by the original APA, as I have put it—they are sort of the "conscience of the agency"—whether that is the best way to go.

Their task is every bit as challenging as an article 3 judge; there is no doubt about it. I am not sure where that conclusion gets you, though.

Senator **Heflin**. Thank you, sir. We appreciate your testimony.

Mr. **Cynkar**. Thank you, Senator.

Senator **Heflin**. Next is a panel consisting of Judge Victor Palmer, administrative law judge, U.S. Department of Agriculture, for the Federal Administrative Law Judges Conference; Hon. Joyce K. Barlow, administrative law judge, Social Security Administration, for the Association of Administrative Law Judges; and Hon. Marvin H. Morse, chief administrative law judge, U.S. Small Business Administration, for the Federal Bar Association.

We are delighted to have you. Judge Palmer, if you will, sir.

STATEMENTS OF A PANEL CONSISTING OF HON. VICTOR PALMER, ADMINISTRATIVE LAW JUDGE, U.S. DEPARTMENT OF AGRICULTURE, FOR THE FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE; HON. JOYCE K. BARLOW, ADMINISTRATIVE LAW JUDGE, SOCIAL SECURITY ADMINISTRATION, FOR THE ASSOCIATION OF ADMINISTRATIVE LAW JUDGES; HON. MARVIN H. MORSE, CHIEF ADMINISTRATIVE LAW JUDGE, U.S. SMALL BUSINESS ADMINISTRATION, FOR THE FEDERAL BAR ASSOCIATION

Judge **Palmer**. Thank you so much, sir. Senator Heflin, I appreciate your invitation to again state the views of administrative law judges who favor enactment of your bill and the establishment of a corps of administrative law judges.

Before I read—and I promise you I will not read it all, I am going to skip around—but before I read from the prepared text that has been submitted, let me quickly identify the chief benefits that enactment of S. 673 will achieve for those whose cases are heard by administrative law judges.

First, it will provide a most needed new structure for the supervision and management of administrative law judges. Under the present system, each judge is a subordinate employee of the agency whose cases he hears. His/her agency employer always has a real and substantial interest in the outcome of every case the judge decides, and very often is a named party in the cases its judges hear. The proposed corps would replace this system so that all Federal administrative law judges will be managed and supervised by a collegially constituted body of administrative law judges with individual judges assigned to specialized divisions.

This new structure is needed by the public to do the following. One. Guarantee, and be perceived by the public as guaranteeing, the neutrality and impartiality of administrative law judges as factfinders by fully insulating them from influence or pressures exerted in the guise of day-to-day management by the agencies whose cases they hear.

Two. Assure that administrative law judges will be held accountable for any misconduct or neglect of duty by a supervisory body that cannot be challenged on the basis that it is really a disgruntled party of interest, attempting to punish a judge for entering a decision not to its liking.

Three. Place the management of all administrative law judges in the hands of experienced judges who have taken the same oath of office and whose understanding and appreciation of the duties and responsibilities of the administrative law judge office comes from actual performance of those duties and responsibilities.

Other legislative proposals you may be asked to consider would instead leave control of the judges in the hands of clerks and managers who are without this understanding and appreciation of the judicial function. Additionally, the proposed corps will achieve other benefits that bills restricted to the Social Security Administration, for example, cannot.

The proposed corps will make the administrative law judge system more efficient, will better assure that every agency will have judges adequate to its hearing needs, and will save tax dollars.

Passage of the corps bill can attain each of these improvements while preserving and enhancing the best aspects of the present system; most notably, merit selection and the application of expertise in agency decisionmaking.

Now others who previously testified on this subcommittee will not be appearing again, but we ask that their testimony be considered as fully as if it was given today, and I have listed names in the prepared text.

It is also requested that the testimony and data previously furnished respecting the operation of central panel systems by the States of New Jersey and Minnesota be supplemented by inclusion of recent reports by each State.

Chief Judge Ronald Parker of the State of New Jersey, who is here today to testify will provide that report, and I have here a copy of the Minnesota report which I ask also be included.

Senator HEFLIN. Without objection, all of those will be made a part of the record.

[The reports follow:]

State of New Jersey

ADMINISTRATIVE LAW COMMITTEE
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Charles E. Hager,
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August 31, 1984

The Honorable Thomas H. Kean
Governor of New Jersey
State House
Trenton, New Jersey 08625

Dear Governor Kean:

The Governor's Committee on the Office of Administrative Law is pleased to submit its final report in accordance with your Executive Order 38 dated April 7, 1983.

The recommendations in the accompanying document were unanimously approved by the Committee, and are the product of a comprehensive analysis of the effectiveness of New Jersey's Office of Administrative Law. It is our opinion that the recommendations are both sound and practical. They were made after hearing from attorneys with expertise in the practice of Administrative Law, State officials, and members of the public who deal with the Office of Administrative Law. The Committee members also thoroughly examined the legislative history and intent of the Office of Administrative Law.

The thoroughness of this analysis was possible only because of the consistent contribution of Committee members through 15 months of research, discussion and public hearings. As Chairman, I wish to commend the diligence of the Committee and its sense of public duty. In addition, I would like to express the Committee's appreciation for the excellent staff assistance provided throughout the development of this report.

Respectfully,

Frank X. McDermott

Frank X. McDermott, Chairman
Governor's Committee on the
Office of Administrative Law

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State of New Jersey

GOVERNOR'S COMMITTEE ON THE OFFICE OF ADMINISTRATIVE LAW

1984

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A. Creation of Administrative Law Committee

The Governor's Committee on the Office of Administrative Law was established on April 7, 1983, pursuant to Executive Order No. 38 of Governor Thomas H. Kean. Executive Order No. 38 specifically charged the Committee with studying the following issues and reporting its findings and recommendations to the Governor:

1. Any and all ways of improving the amount of time necessary to dispose of an administrative law case, including an analysis of whether separate and distinct procedures could be instituted to accommodate different types of cases;
2. Suggested means for dealing with the existing backlog of cases;
3. The necessity or desirability of requiring that administrative law judges (ALJs) be attorneys licensed to practice law in the State of New Jersey;
4. The appropriate atmosphere which should be fostered during administrative law hearings, including the degree to which formalized courtroom proceedings, such as the wearing of judicial robes by ALJs, should be encouraged or discouraged; and
5. The appropriate role of the Office of Administrative Law (OAL) within the Executive Branch.

Since its inception in 1978, the performance of the OAL has never been evaluated in terms of the legislative mandate under which it was created. Furthermore, the nature of administrative law in New Jersey has changed significantly during the last five years as demonstrated by an increase in the number and types of hearings coming under the jurisdiction of the OAL. Due to the importance and significance of the OAL in the framework of State government, Governor Kean felt that an evaluation of the function and performance of this office was warranted.

The life of the Administrative Law Committee was extended from April 7, 1984 to July 7, 1984 under authority of Governor Kean's Executive Order No. 64, which was signed on March 22, 1984.

B. Legislative History of the Office of Administrative Law

Before considering the conclusions and recommendations of the Committee, it is essential to examine the historical background of administrative law hearings in the State of New Jersey. Until the formation of the OAL in 1979, administrative hearings were conducted primarily by hearing officers who were employed by the various State departments or agencies. These hearing officers presided over contested matters and made a recommended report and decision to the appropriate agency head, who was authorized to adopt, reject or modify the hearing officer's recommendation in making the final decision. This system led to criticism on several fronts, as litigants and their attorneys inevitably felt that the status of hearing officers as departmental employees raised substantial due process and fairness concerns, especially in cases where the agency was also an adversary party to the hearing. To compound this issue, many of these hearing officers worked for the departments and agencies on a part-time or per diem basis while engaged in private business pursuits; as a result, the quality of hearing officer opinions was often erratic and there were long delays in the disposition of cases. Furthermore, hearing officers sometimes served the role of agency advisor in reaching an initial determination and hearing officer if their initial determinations were challenged; this combination of responsibilities led to obvious public perceptions of agency bias.

The system was tolerated for decades, although not without criticism, until legislative reform was seriously considered in the mid-1970s. After several abortive legislative attempts to establish a centralized office of hearing examiners for resolving contested administrative decisions, the Legislature succeeded in passing Senate Bill No. 766 (P.L. 1978, c. 67), which established the Office of Administrative Law. This bill, sponsored by Senator Charles Yates, was signed into law by Governor Brendan Byrne on July 6, 1978 and was subsequently codified in N.J.S.A. 52:14F-1 et seq. The legislative intent of S-766 was succinctly indicated in the bill statement, which read in part as follows:

> The purpose of this legislation is to improve the quality of justice with respect to administrative

> hearings. In many agencies hearing officers serve on a part-time basis. They are either self-employed persons who are paid per diem to hold hearings or they are State employees who also perform other duties for their agency in addition to holding hearings. In both instances, a hearing officer frequently presides over cases in which his own employer is an interested party. In some agencies the backlog of cases is extensive and some administrative hearings have been cited as examples of faulty procedure.
>
> The legislative goal embodied in this bill is to create a central independent agency staffed by professionals with the sole function of conducting administrative hearings. This will tend to eliminate conflict of interest for hearing officers, promote due process, expedite the just conclusion of contested cases and generally improve the quality of administrative justice.

The history of S-766 and other earlier attempts to establish an Office of Administrative Law, which fortunately has been preserved in transcriptions of public hearings and legislative committee hearings, indicates a clear legislative intent to create a centralized pool of full-time independent Administrative Law Judges in order to address the cited problems of agency bias, lack of professionalism, and excessive delay in the administrative hearing process.

Although this legislation removed control over administrative hearings from the executive departments, the Legislature was careful to preserve the role of the agencies as the formulators of administrative policy. Throughout the legislative history of S-766, many State officials stressed the need for agency expertise in the administrative hearing process and asserted that it would be lost if the hearings were conducted by hearing officers who lacked specific knowledge of the specialized workings of the agency. This argument was premised on the notion that career employees who have devoted years to interpreting and implementing perhaps a single statute were more likely to arrive at appropriate decisions than were independent, nonexpert hearing officers. More importantly, the agencies felt that this expertise was integral to the formulation of consistent administrative policy by the respective agency head, who were appointed by the Governor to fulfill that policy-making function. Conversely, some persons expressed the view that agency expertise was synonymous with agency bias, and that neither was acceptable in the administrative hearing process.

The Legislature resolved the policy-making dilemma in S-766 by transferring the hearing function for all but several enumerated types of cases to the OAL while preserving in the agency head the authority to adopt, reject or modify the findings of fact and conclusions of law made by the ALJ. In order to ensure agency expertise, the Legislature included a provision, found at N.J.S.A. 52:14F-6(a), which provides that ALJs shall be assigned to agencies in accordance with their special expertise. By requiring persons with the necessary background to work regularly with an assigned agency, it was felt that the concern over the loss of agency expertise would be allayed.

In addition to hearing contested cases, the OAL is statutorily required to perform the functions previously exercised by the Division of Administrative Procedure in the Department of State. These duties, which are enumerated in N.J.S.A. 52:14B-1 *et seq.*, include the publishing of all State agency rules and regulations in the New Jersey Register and the New Jersey Administrative Code.

C. Committee Membership and Deliberative Process

Executive Order No. 38 specified that the Administrative Law Committee should consist of thirteen members, including the Secretary of State, the President of the Civil Service Commission, the Commissioners of Education and Human Services, the Director of the Division of Motor Vehicles, a representative of the Governor's Office, an Administrative Law Judge, and six public members. The six public members selected included four private sector attorneys, one corporate attorney, and a representative of organized labor. The Committee thus was comprised of a diverse spectrum of individuals acutely interested in the practice and future of administrative law in New Jersey. More importantly, the Committee consisted of members who dealt with the OAL from varying perspectives and thus brought different perceptions to the discussion table. The agency heads sitting ex officio on the Committee were involved in a wide spectrum of hearings, including employee disciplinary proceedings, teacher tenure cases, welfare entitlement matters, and driver's license revocations, and represented departments which were among the heaviest users of the OAL. By virtue of the differing nature of these hearings, there were often conflicting opinions among the agency heads on the issues considered by the Committee. The presence of the agency heads was balanced by the private sector attorneys, who in general had extensive experience representing litigants under both the agency hearing system and the OAL, and thus provided an invaluable analysis of the relative merits of an independent hearing officer system. In addition, several of the private sector attorneys are active and influential in the New Jersey Bar Association. The remaining members of the Committee offered enlightening viewpoints due to their unique roles in the administrative law process. Coincidentally, the Committee included several former legislators who had participated in the passage of S-766 and were able to provide an illuminating view of the intended role of the OAL.

In discussing the issues raised in Governor Kean's Executive Order, the Committee looked in detail at the legislative history behind the creation of the OAL, the current operations of the OAL, the viability of the OAL versus the former agency hearing system, and the administrative law systems employed by other states and by the federal government. The Committee was fortunate to hear testimony from persons with direct knowledge of and experience in each of these areas.

As might be anticipated, the diverse nature of this group resulted in the expression of strikingly divergent perspectives regarding the function and intended role of the OAL. These differences of opinion were gradually smoothed out as Committee members forthrightly evaluated the testimony of witnesses and discussed problem areas until agreements or acceptable compromise positions could be reached.

The Committee undertook its charge by conducting ten full-day meetings. Throughout the course of these sessions, which were divided between Trenton and Newark to allow greater accessibility to all concerned parties, the

Committee attempted to elicit testimony from every responsible source. In addition to soliciting oral and written testimony from numerous agency heads, the Committee set aside two sessions as public hearings and complied with the statutory notice procedures applicable to all open public meetings. At these public meetings, the Committee heard testimony from persons who had appeared before the OAL, including attorneys, elected officials, representatives of State agencies, and private litigants. Also included were representatives of the Governor's industry consultants who previously studied the OAL as part of the Governor's Management Improvement Plan - whose report was made part of our record. The Committee entertained testimony from all interested parties, including private citizens, and welcomed the attendance of representatives of the media. A full listing of the members of the Committee and all persons testifying before it are included in this report.

The focus of the Committee throughout these proceedings was on the specific points raised in the Governor's Executive Order, although several additional issues essential to the Governor's general charge were examined at length.

II. Conclusions and Recommendations

The Committee's investigation led to a conclusion that the OAL was an efficient, well-run organization which represented a significant improvement over the former hearing system in terms of quality and productivity. Although there was general agreement that the OAL's performance was more than satisfactory, it was felt by the Committee that a number of areas could be improved upon and should be scrutinized by the OAL. The major findings and recommendations of the Committee can be summarized as follows: (Not listed in order of priority)

A. The level of formality in administrative hearings is not overly excessive, but procedures should be streamlined through mandatory discussions between the OAL and the department and agency heads.

B. The wearing of judicial robes by ALJs should be discretionary based on guidelines established by the OAL in consultation with each department and agency.

C. The OAL is too inflexible in its use of hearing locations and should endeavor to utilize alternate settings, such as county, municipal and agency facilities. A plan should be formulated by the OAL for the use of such facilities in order to provide greater accessibility to litigants and witnesses in administrative hearings.

D. The procedural practices employed in administrative hearings are generally satisfactory but should be continuously studied and improved upon in order to provide the most efficient hearing system possible. Among the suggestions made by the Committee were the encouragement of greater expedition through the improved use of discovery and motion practice, prehearing conferences, and settlement procedures, and the strict limitation of delaying vehicles such as the granting of adjournments and the filing of post-hearing submissions.

E. ALJs should be granted statutory subpoena power (absent contempt power) in order to provide them with greater control over the hearing process.

F. The OAL should continue the study of alternative methods designed to expedite the disposition of cases. This study should include experiments in the use of oral opinions and the institution of special fast-tracking procedures for certain cases requiring speedy resolution.

G. Due to the increasing number of hearing petitions being filed and the number of new laws bringing more types of cases within the OAL's jurisdiction, the Governor should have the power to appoint more ALJs as needed to meet existing workloads. The OAL should also establish and maintain a list of temporary ALJs, perhaps consisting of retired judges, who would serve on an on-call basis to help reduce temporary backlogs in cases.

H. All newly appointed ALJs should be attorneys-at-law licensed in the State of New Jersey. However, current ALJs who are not attorneys should be retained if their performance satisfies the reappointment criteria. The reappointment of ALJs should be based on the same general guidelines used for the reappointment of Superior Court Judges.

I. ALJs should be appointed on a bipartisan basis similar to the practice employed by the Judiciary and should be granted tenure after 10 years of service and subsequent reappointment to an additional term. If this is implemented there should be a procedure established for the discipline and removal of judges, for cause, perhaps modeled after the system used for Worker's Compensation Judges.

J. The OAL should consider a Senior Judge Corps consisting of six judges who would be responsible for certain areas of expertise and would perform administrative, advisory and hearing functions within that area. Under each senior judge, there would be approximately eight ALJs who would hear cases within that realm of specialization.

K. The judicial evaluation program currently administered by the OAL is an excellent one and should be continued. However, this program should be subjected to a continuous evaluation and refinement process. One of the areas in which this program might be streamlined would be in having the proposed senior judges fulfill some of the review functions now being performed by the Director of the OAL.

L. Many attorneys and litigants appearing before the OAL are frustrated by a procedure whereby the same agency personnel sometimes participate in the initial agency determination, the OAL hearing, and the subsequent review of the ALJs recommendations. The Committee resolved this dilemma by recommending that any persons performing investigative, prosecutorial, or advocacy functions on behalf of an agency in a contested case should not be permitted to participate or advise the agency head in the final administrative decision.

M. Where an agency head modifies or reverses a particular fact-finding of an ALJ, the final decision should clearly and sufficiently identify that part of the record where the evidence is presented and provide, in detail, reasons which support the agency head's modification or reversal. Agency heads should give deference to factual determinations which are based on the credibility of a witness.

N. ALJs should not be given absolute final decision-making authority due to the policy-making responsibility vested in the executive departments and agencies. However, consideration should be given to permitting agency heads to delegate final decision-making authority to ALJs in certain cases which do not involve policy issues or considerations.

O. The OAL should confine its processing of agency rules to a technical and stylistic review of rules submitted for publication by the various departments and agencies and should update the New Jersey Administrative Code on a more frequent regular basis.

P. A statutory change should be made to allow a designee of the agency head to hear petitions for emergent relief, instead of the agency head, provided that the final determination in such case is made by the agency head.

III. The Administrative Hearing Process

The Committee examined a number of issues involving the OAL hearing process, including the exploration of methods for decreasing the amount of time necessary to dispose of administrative hearings, the feasibility of instituting separate procedures to accommodate different types of cases, methods of dealing with the existing backlog of cases, and a determination of the appropriate atmosphere in which administrative law hearings should be conducted. This investigation was prompted in part to review whether the OAL, which was intended by the Legislature to be a professional, centralized pool of Administrative Law Judges, had developed into a system replete with delays, overformalization and backlog of cases.

The Committee entertained extensive testimony on these issues from a wide spectrum of interested parties, including representatives of State agencies, private attorneys who regularly practiced before the OAL, and private citizens who had been litigants in administrative hearings. As might be expected, there was a wide diversity of opinion expressed by this group, primarily based on the type of case each witness was involved in or whether they represented a State agency or a private litigant.

The issues involving the hearing process are best broken down into two broad categories, one consisting of the formality of administrative hearings and the other dealing with the procedural practices followed by the OAL.

One of the primary criticisms of the OAL was the alleged overformalization of the hearing process. While much of this criticism dealt with essentially non-substantive issues such as the wearing of judicial robes by ALJs, including those who were not attorneys-at-law, it was felt that this insistence on formality was inextricably related to the charges that the OAL procedures were unreasonably costly and time-consuming. One issue considered by the Committee was the wearing of judicial robes by ALJs. On this subject, there was a wide variety of viewpoints aired. Some of the agencies dealing primarily with pro se litigants, such as public welfare recipients, felt that the presence of a robed judge injected an intimidating tenor to the proceedings. Conversely, other State agencies involved in similar types of cases felt that the wearing of robes added an aspect of impartiality to the hearing which gave the litigant a greater degree of security. Agencies dealing with complex issues in which all parties were represented by counsel generally favored or did not object to wearing of robes and the use of formal courtroom settings. The Committee also heard testimony to the effect that the wearing of robes by Federal Administrative Law Judges is discretionary based on a case-by-case determination made by the ALJ. The Committee concluded that this is interrelated with the premise of providing an informal, expeditious disposition of contested cases. It was determined by the Committee that the wearing of robes should be left to the discretion of each ALJ within the confines of guidelines established by the OAL in consultation with each individual agency. This procedure would establish the best means of having the wearing of robes conform to the circumstances of each type of case heard by the OAL.

Another aspect of the formalization problem was the insistence upon the use of courtroom locations and settings by the OAL. A number of State agencies dealing with pro se litigants felt that the OAL was inflexible in its use of setting, thus precluding many litigants from pursuing their actions due to lack of transportation to the hearing facilities. This also imposed a burden on State agencies by requiring the transportation of key personnel to the hearing sites, which would often result in their absence from work for an entire day. The Legislature addressed this problem in P.L. 1981, c. 202, which amended N.J.S.A. 52:14F-5 to require that OAL proceedings be held at suitable locations taking into consideration the convenience of the parties as well as the nature of the case. Despite this statutory provision, the Committee found that the OAL was too dogmatic in its insistence on proper courtroom settings and determined that more attention should be paid to accommodating the interests of the litigants and agency personnel required to attend the hearing. It was generally felt that the use of municipal buildings and administrative agency facilities should be utilized as often as possible. The OAL indicated that it is not welcome in such local facilities, as it creates a demand for certain support services and does not provide any reimbursement to the local entities. There was a further concern expressed by OAL representatives that the use of administrative agency and county facilities would be inappropriate, as neutral courtroom settings were necessary to ensure the integrity of the hearing process. The Committee felt that the OAL should continue and increase where practical its practice of holding hearings in local facilities for the convenience of litigants. This plan should consider the feasibility of providing for the reimbursement for the use of local buildings.

The issue of procedural formality was also discussed at great length by the Committee. In general, the Committee felt that the framework of the present system employed by the OAL should be retained, but should be improved by mandatory discussions between the OAL and each agency head. This would permit the degree of procedural formality to vary depending on the nature of each case and thus should provide a more suitable procedure for each type of hearing. While there would still be an element of discretion left to the ALJ handling each case, the Committee strongly felt that informality should be encouraged in proceedings to the extent possible.

In reaching its conclusion on this broad issue, the Committee considered in detail the present procedural practice of the OAL and explored possible means of improving this system. Included in this discussion was an extensive look at the discovery process currently used by the OAL. Although the Committee recognized that a prolonged discovery process could lead to the type of protracted proceedings which the OAL was intended to avoid, it was agreed that the existing discovery procedure should remain essentially intact. This conclusion was based upon the Committee's concern that any limitation on the amount of discovery available to litigants would present a potential limitation of individual rights. As this was considered to be an issue of extreme importance, the Committee felt that a serious effort should be made by the OAL to balance the individual rights of the litigant with the public concern regarding the problem of delay in OAL proceedings. However, the Committee felt that the discovery practices utilized by the OAL should not be expanded to conform to those employed by the courts.

In considering other procedural matters, the Committee felt that pre-hearings conferences should be held only when necessary to clarify issues or other essential matters. These conferences are now optional depending on the intricacies of each case. The Committee, however, would prefer that prehearing matters be resolved as often as possible by telephone conference calls and the submission of papers as opposed to in-person meetings. Similarly, the Committee considered whether it would be advisable to limit motion practices, which are responsible for delays and additional costs. Although it was concluded that this is not currently a problem, the Committee deemed it important to address this issue in order to prevent it from becoming one. In this area, it was also felt that telephone conferences and the submission of papers was the preferred course of action. Although some State agencies have criticized the OAL for not pursuing settlement efforts, the OAL has indicated that their internal practice is to encourage settlements whenever possible. The Committee agreed with this policy and felt that settlement efforts should be promoted vigorously. Another procedural practice of the OAL considered by the Committee was the alleged liberal granting of adjournments in administrative hearings. While some agencies felt that adjournments were granted too readily, the OAL indicated that adjournments are viewed unfavorably and are not granted absent compelling circumstances. The Committee determined that the granting of adjournments should be strictly limited in an attempt to further expedite proceedings before the OAL. In the same vein, the Committee concluded that stipulations of facts in which all parties join should be strongly encouraged and that post-trial submissions, which extend the 45-day period in which a decision must be made and result in additional costs to the litigants, should be discouraged.

The Committee also considered the feasibility of granting ALJs direct subpoena power and contempt power as a means of increasing their control over the progress of administrative hearings. It was generally felt that, while the granting of subpoena power in ALJs was desirable, it would be inadvisable to bestow contempt power upon them. Currently, ALJs possess no inherent subpoena power, but can issue subpoenas which are enforceable derivatively through the authority of the agency referring the case to an ALJ. This authority varies from agency to agency and indeed some agencies do not have subpoena power. The Committee concluded that ALJs should explicitly be given statutory subpoena power without contempt power in order to resolve this issue.

Perhaps the most fertile area for reducing the amount of time required for OAL proceedings involves the disposition of cases through oral opinions. Currently, this practice is not generally followed because it is felt that the agencies require a full record for their review of the ALJ's recommendation. The OAL is exploring the use of oral opinions through a pilot program, which is working well thus far. Under this pilot program, ALJs may deliver their initial decision on tape and have them transcribed for the purpose of agency review. There was a general feeling by the Committee that the use of oral opinions where appropriate would be beneficial to the entire process, although there were concerns expressed that agency heads needed a written decision to review and that findings of fact and conclusions of law are important and should be preserved. The Committee determined that experiments in eliminating written decisions should be encouraged, provided that such efforts should not affect the rights of appeal for any party or result in the loss of a record for agency review. This is in conformity with a recommendation by the Governor's Management Improvement Plan that oral decisions be rendered in certain cases.

The Committee also considered the feasibility of instituting special procedures for certain cases which require expeditious determinations due to statutorily imposed deadlines or other compelling circumstances. The OAL currently gives priority to cases upon the request of the party or agency, and has demonstrated an ability to dispose of emergent matters within shortened time periods. It was felt by the Committee that certain types of cases which require speedy resolution, such as tenure appeals and budget hearings, should routinely be given priority through special procedures designed to conclude them as quickly as possible. Accordingly, the Committee agreed that the OAL should study this matter and design "fast-tracking" procedures where applicable. Regarding other procedural issues, the Committee decided that the parties or the ALJ should have the power to bifurcate hearings when such action might moot out the need for further hearings.

It was also recommended that a statutory change should be made to allow a designee of the agency head to hear petitions for emergent relief, instead of the agency head, provided that the final determination in such case is made by the agency head.

In conclusion, the Committee felt that the OAL hearing process represented a significant improvement over the previous agency hearing system and concluded that cases were generally handled in a more professional and expeditious manner by the OAL. However, there were legitimate concerns expressed regarding the overall efficiency of the OAL operation, and the Committee felt that improvement could be made in certain areas. For example, it currently takes up to five weeks for a contested case to be assigned to an ALJ and scheduled for a hearing. The Committee felt that this period was excessive and recommended that all cases be assigned within two weeks of delivery and given a hearing date within four weeks of delivery. A possible means of facilitating this process might be appropriation of funds to the OAL for the purchase of more sophisticated data processing equipment.

The Committee also felt that the OAL should discontinue its practice of having messengers hand-deliver all initial decisions to the appropriate agency heads before release to the parties. This determination is consistent with a recommendation made by the Governor's Management Improvement Plan.

IV. Selection and Appointment Procedures for Administrative Law Judges

Although the selection and appointment procedures for ALJs were directly addressed in the Governor's Executive Order only insofar as they affected the status of ALJs who were not attorneys, the Committee determined that this entire topic was important to the quality and future of the OAL and devoted extensive time considering it.

The appointment and reappointment provisions for ALJs are set forth in N.J.S.A. 52:14F-4, which is part of the statute creating the OAL. This section provides that ALJs shall be appointed by the Governor, with the advice and consent of the Senate, for initial terms of one year. During this initial one year term, each ALJ is subject to a judicial evaluation program which is described in N.J.S.A. 52:14F-5(s). The first reappointment of an ALJ after completion of this initial term is made by the Governor for a term of four years and until the appointment and qualification of the ALJ's successor. Subsequent reappointments are made by the Governor, with the advice and consent of the Senate, for additional terms of five years.

Although the Committee determined that this procedure has generally worked well, it was felt that several changes were warranted in order to further professionalize the OAL and to attract highly qualified persons to serve as ALJs. In order to attain these goals, the Committee determined that the implementation of procedures similar to those utilized by the Judiciary was appropriate for the selection and appointment of ALJs.

The selection of ALJs begins with an interview by the Director of the OAL of all candidates selected by the Governor. A report on each prospective ALJ is prepared by the Director and forwarded to the Governor, who makes the selection and submits the nominations to the Senate for confirmation. Due to the relatively short terms provided to ALJs, it was feared by the Committee that this arrangement carries with it the potential for politicizing of the OAL. For this reason, the Committee agreed that there be a bipartisan balance among ALJs consistent with the practice currently followed in the Superior Court of the State of New Jersey. In order to accomplish this goal the Committee proposed that, once a bipartisan balance has been reached in the OAL, appointees should be of the same political persuasion as the ALJs whose positions they are filling. Until such equipoise is attained, initial appointments should be made with the purpose of eliminating the current disparity in the party affiliations of ALJs.

During its discussion regarding the selection process, the Committee devoted extensive attention to the issue of non-attorneys serving as ALJs. The legislation creating the OAL has no absolute requirement that ALJs be attorneys-at-law licensed to practice in the State of New Jersey; only the Director is required to possess this status. This topic was debated throughout the legislative process of Senate Bill No. 766, but the Legislature felt that the circumstances existing at that time militated against requiring attorney status for all ALJs. When the OAL was created, there were scores of departmental and agency hearing examiners who, despite not being attorneys, possessed considerable experience and expertise in their subject areas. As this legislation contemplated the assignment of ALJs to agencies in order to ensure the continuance of this expertise, it was felt that some of these non-attorney hearing examiners were highly competent and should be eligible for consideration as ALJs. The Legislature addressed this situation by requiring that ALJs be attorneys-at-law of the State of New Jersey, with the exception of non-attorneys who, in the discretion of the Governor, are qualified in the field of administrative law, administrative hearings and proceedings in subject matter relating to the hearing functions of a particular State agency. As a result, a significant number of the first ALJs selected were non-attorneys formerly employed as hearing examiners by various State departments and agencies.

The existence of ALJs who are not attorneys caused some concern among attorneys and litigants appearing before the OAL, and, as the reason for originally permitting non-attorneys to serve as ALJs is no longer applicable, the Committee studied this issue in considerable depth. Most of the witnesses testifying before the Committee commented on this issue, with a number of differing viewpoints being expressed. The majority position was that ALJs should be required to be attorneys, as most attorneys and litigants felt more comfortable with ALJs who were well versed in the legal and procedural aspects of administrative practice. Some witnesses even related instances where non-attorney ALJs impeded the progress of hearings through a lack of procedural knowledge. Conversely, some witnesses stated that they detected no difference in competence between attorney and non-attorney ALJs.

The Committee agreed with the majority and concluded that, in all future initial appointments, ALJs should be attorneys-at-law licensed in New Jersey. This result was predicated in part upon the diversity and complexity of cases that ALJs are required to hear. Although some types of cases, such as those involving welfare entitlements, require little legal background, others, such as utility rate cases, are extremely complex and require well-developed abilities in legal analysis and interpretation. As all ALJs, including former departmental hearing officers hired for their special expertise, hear a wide variety of cases, it was felt that all ALJs should be attorneys. This requirement would also serve to enhance the professional perception of the OAL.

The status of non-attorney ALJs was also a significant part of the Committee's discussion of the reappointment process. It was decided that, although all new ALJs should be attorneys, the non-attorney ALJs had acquired considerable expertise during their tenure and should be reappointed if their performance merited such action. The Committee strongly believed that the reappointment process should be based solely on merit and should be utterly devoid of political considerations. In making a reappointment decision, the Governor should be guided by the judicial evaluation of the ALJ prepared by the Director of the OAL and by the same general criteria considered in the reappointment of a Superior Court Judge.

Closely intertwined with the reappointment issue is the notion of tenure, which is currently not available to ALJs. Under existing law, ALJs are eligible to be reappointed to an unlimited succession of five year terms up to the mandatory retirement age of 70 but are not granted tenure protection. The Committee felt that the stability and prestige of the OAL would be enhanced by granting tenure to ALJs, as this would provide the status and security necessary to attract and retain the best possible judges. In order to achieve this objective, the Committee recommends that ALJs be granted automatic tenure upon the completion of 10 years of service and reappointment to a successive term. Under this proposal, each potentially tenured ALJ will be subject to several reviews by the Governor and the Director of the OAL after the initial appointment and more than one confirmation by the Senate after the original appointment and confirmation requirements. This system should be more than adequate to prevent the granting of tenure to undeserving candidates. Concomitant with this tenure provision should be the formulation of a process for the discipline and removal for cause of ALJs, perhaps patterned after the methods applicable to Worker's Compensation Judges.

An integral part of the selection and reappointment process is the judicial evaluation program which is mandated by N.J.S.A. 52:14F-5(s). This program is said to be the most comprehensive of its kind in the nation, and it has drawn acclaim from all those who commented upon it. Major components of this program include the solicitation of opinions and comments from attorneys and litigants who have appeared before the OAL, the detailed evaluation of each ALJ by measures of the Director of the OAL in the areas of competence, productivity, demeanor and detailed statistical output. The Committee was favorably impressed by this system of judicial evaluation and strongly recommended that it be continuously evaluated for purposes of further refinement and improvement.

Another question that arose was whether or not there is a need for additional ALJs for the purpose of reducing existing backlogs and providing for a more expeditious disposition of cases. The Committee heard testimony to the effect that the number of ALJs has remained relatively constant since the inception of the office despite the fact that the number of cases filed has increased twofold. Due to recent legislative changes, it is anticipated that the OAL caseload will increase even further during the next year. For example, the Division of Motor Vehicles recently mailed over 70,000 notices pursuant to P.L. 1983, c. 65, which imposes insurance surcharges on drunk driving violators and motor vehicle operators who have accumulated more than six points. It is estimated that 1,000 petitions for OAL hearings will be filed in response to these billings. Similarly, the Worker and Community Right-To-Know Act (P.L. 1983, c. 315), signed into law on August 29, 1983, will result in approximately 1,500 requests for hearings according to estimates concurred in by the Department of Environmental Protection and the Office of Legislative Services. In addition, there are scores of other recently enacted or pending legislative proposals which would result in an increased case load for the OAL.

In view of the increasing case load and the prospect of more requests for hearings in the foreseeable future, the Committee felt that the hiring of more ALJs would be warranted. Although the Committee did not determine the specific number of additional ALJs required, it felt that the available positions should be raised to a level sufficient to permit the Governor the flexibility of making further appointments based on existing needs. The Committee also felt that a corp of temporary judges should be established, perhaps drawn from retired judges, in order to deal with temporary upward fluctuations in the caseload. However, the Committee will instruct the Director of the OAL to make a report on alternative methods of disposing of cases.

The Committee supports the establishment of a Senior Judge Corps which would increase the effectiveness of the OAL. This proposal would entail the appointment of six senior judges to specified areas of responsibility in which they would exercise administrative and advisory responsibilities while still hearing cases of high visibility and significant legal impact. It was felt that the implementation of this system would promote greater efficiency by having experienced judges working and consulting with ALJs hearing cases in their areas by providing the substantive and procedural direction applicable to the types of cases being heard.

V. The Role of the Office of Administrative Law in the Executive Branch

The Office of Administrative Law, which was established as an independent agency within the Executive Branch of State Government, is expressly delegated the responsibility to hear contested administrative cases for most State agencies and to oversee the rule-making function for the Executive Branch. See N.J.S.A. 52:14B-1 *et seq.* and N.J.S.A. 52:14F-1 *et seq.* The OAL thus performs essential governmental functions directly affecting not only the various agencies but the interests of every citizen of the State.

Under the current law, each State agency may decide which cases within its jurisdiction are contested matters subject to an administrative hearing. An ALJ will preside over the hearing of a contested case referred from an agency and within 45 days from the conclusion of the hearing issue a recommended report and decision ("initial decision") which must contain recommended findings of fact and conclusions of law. The parties are then provided the opportunity to file exceptions, objections and replies to the initial decision. The head of the agency may thereafter adopt, reject or modify the initial decision by issuing a final decision. Where an agency has not acted on the initial decision within 45 days from the receipt of the matter from the OAL, the initial decision is deemed adopted as the final agency decision. See N.J.S.A. 52:14B-10; N.J.S.A. 52:14F-7.

Much of the oral and written testimony received by the Committee focused on the issue of whether the Administrative Law Judge should be granted final decision-making authority in contested administrative cases. Many participants, including the State agencies and the Attorney General, generally opposed any change in the current process while other speakers, most notably the private sector attorneys, had various viewpoints which would allow ALJs final decision authority in some or all areas without agency review. A key issue of debate regarding final decision-making centered on whether there should be a distinction between forum agencies, which do not participate in the administrative hearing process and merely decide cases after the record is complete, and party agencies, which may have made an initial determination which becomes the subject of a contested case or whose staff participate in an adversarial nature during the adjudicatory process. For example, the Civil Service Commission, which acts as a forum agency in its consideration of disputes between various Civil Service employers and employees, does not participate in the hearing process but provides a neutral forum in such matters. In contrast, the staff of the Board of Medical Examiners may engage in investigatory and prosecutorial roles as a party to the proceedings in physician licensing matters that are thereafter finally decided by that same agency. Some agencies such as the Department of Environmental Protection have developed mechanisms by which staff personnel who participate in the case process do not have any advisory role in the Commissioner's final decisions. Other agency heads, such as the Director of the Division on Civil Rights, must by statute make probable cause or similar types of findings before the contested case process can be initiated and later make final determinations after an OAL hearing. The role of the Attorney General in this area was also questioned, as deputy attorneys general serve by law as counsel to various State agencies in prosecutorial, advocacy, and advisory functions.

After extensive discussion, it became clear that there was no useful mechanism for distinguishing between forum and party agencies with respect to final decision authority due to the unique statutory, regulatory and operational mechanisms that have developed for the various State agencies. The Committee determined that the fact that an agency was a forum as opposed to a party agency in a particular case was not a useful basis for restricting or eliminating an agency's final decision authority.

While the Committee rejected the forum/party distinction with respect to final decision-making authority, it did have serious due process and fairness concerns where agency personnel perform investigative, prosecutorial or advocacy functions and later participate in an advisory role to the agency head. The Committee endorsed the process utilized by the Department of Environmental Protection, which restricts staff in such matters, and felt that similar limitations should by instituted in the other State agencies where feasible. This is consistent with the policy established by the Attorney General, who has issued guidelines to the deputy attorneys general which provide that no attorney who serves as a prosecutor in a contested case shall be permitted to have any involvement in the advice function to the agency head on that matter. Additionally, the Committee found no reason to limit or legislatively change those areas where an agency head makes a probable cause or prima facie case determination in order for a matter to be processed as a contested case. Such a finding would not be prejudicial to a party where it merely initiates the administrative process for a hearing and is similar in some respects to a judge's determination or review for interim matters in a judicial proceeding. The Committee thus proposes the following standard:

> No employee, agent, counsel or other person who has performed investigative, prosecutorial or advocacy functions in a contested case shall participate or advise the agency head in the final administrative decision. This, however, would not preclude an agency head who must by law make a finding of probable cause or a prima facie case from issuing the final decision in a case.

Another area of discussion pertaining to final decision-making authority focused on the distinction between policy determinations and findings of fact. The Committee found that, on policy issues and conclusions, the agency head should retain complete discretion and decisional authority. With respect to strictly factual matters, the Committee recognized the important role of the ALJ as hearer of the case in deciding contested facts. Where an agency head modifies or reverses a particular fact-finding of the ALJ, the final decision should clearly and sufficiently identify that part of the record and provide reasons which support the agency head's modification or reversal. In particular, the agency head should give deference to factual determinations of the ALJ which depend on a consideration of the credibility of witnesses. On this issue, the Committee considered the following procedure to be appropriate:

> The agency head shall give due consideration to the factual findings and related conclusions of the Administrative Law Judge and where such a finding or conclusion is modified or rejected, the agency head must provide in the final decision the basis for such action in clear and sufficient detail from the record.

The last consideration regarding final decision-making focused on the fact the agency heads can now in effect delegate to an ALJ final decision-making authority in a particular case through inaction after receipt of the initial decision. In such cases, the ALJ and the parties do not know at the beginning of the process that the agency head will decline to issue a final decision. The record is thus prepared for final agency review necessitating a written initial decision, the possible filing of exceptions and cross-exceptions to the initial decision and the mandatory 45-day period before the initial decision becomes the final case decision. In the Committee's judgment, consideration should be given to permitting an agency head to determine at initial processing whether final decision-making authority will be deferred to the ALJ in a specific matter or type of case. Any such deferral should, however, be optional and limited to those cases that would entail factual determinations rather than policy issues or considerations. An agency head may also defer certain issues to the ALJ while retaining final authority on other matters. For instance, in a motor vehicle case the Director of Motor Vehicles might defer the liability question for final resolution by the ALJ but retain final authority to review penalties or sanctions.

The agency head should retain complete discretion in determining the cases or issues that would be deferred to an ALJ for final decision. This is necessary since the distinction between merely factual issues and policy matters is often difficult to clearly delineate and will vary from agency to agency. Moreover, the Committee recognized that an agency head may retain all cases for final decision. However, it was felt that where an agency head had not deferred final authority, he or she should be obligated to issue a final order to terminate the administrative process. A mechanism should also be available for a reconsideration of deferral if, during the administrative process, legitimate policy issues or concerns are presented which would require agency head final review. Such a deferral procedure would require a legislative change. In this regard, consideration should be given to amending N.J.S.A. 52:14F-7(a), to read:

> Nothing in this amendatory and supplementary act shall be construed to deprive the head of any agency of the authority pursuant to section 10 of P.L. 1968, c. 410 (C.52:14B-10) to determine whether a case is contested or to adopt, reject or modify the findings of fact and conclusions of law of any administrative law judge.

> However, a head of an agency may defer final decision authority to an administrative law judge on transmittal to the Administrative Law Judge in a contested case or on an issue in a case which does not involve a policy decision. The deferral may be reconsidered during the administrative process if the head of the agency or the administrative law judge determines that the matter will ultimately concern policy issues and that it should be reviewed by the head of the agency.

The Committee also reviewed the OAL's responsibility with respect to agency rule-making. At present, the OAL performs mainly ministerial functions in reviewing agency rule proposals for format and style and providing technical assistance in this area. It also prepares the New Jersey Register, the publication for public notice of rule proposals and adoptions, and coordinates the publication and dissemination of the New Jersey Administrative Code, which provides a compilation of New Jersey administrative regulations. Certain agency staff testified concerning the intrusion of the OAL into agency rule-making authority and its failure to promptly publish certain agency rules. Moreover, long delays of over a year in updating the New Jersey Administrative Code were presented.

The Committee considered that substantive areas involving agency rule-making are clearly matters for the agency head to determine and should not be reviewable by the OAL. While the Committee recognized the OAL's oversight responsibility to ensure grammatical correctness and other technical requirements with respect to the New Jersey Register and the Administrative Code, it considered that such a role must be strictly limited and the agency head must retain discretion and overall authority in administrative rule-making.

Furthermore, the Committee strongly objected to the existing long delays in the Administrative Code updating. Such practice undermines the usefulness of the Code and creates great confusion as to the operating regulations in State Government. Immediate procedures should be implemented to change the present system and ensure an updated system that would provide Code changes on a more uniform program such as a monthly process.

In reviewing the history and operations of the OAL, it became evident that the OAL must function as an integral part of the Executive Branch. In particular, New Jersey's constitutional framework provides for a strong and viable Executive Branch of government with the power and authority exercised directly by the Governor and derivatively by agency heads accountable to the Governor. Executive policy and direction is expressed in many contexts, and agency rule-making and administrative adjudication are of prime importance. The ability of the Executive Branch to maintain and regulate these administrative processes without interference from the other branches of government is essential to its independence and ability to manage governmental services and programs. As the Supreme Court recognized, "[a]dministrative agencies cannot be expected to cover the course of administrative regulation on one leg. They need both their rule-making and adjudicatory powers to perform their duties properly." In re Uniform Admin. Procedure Rules, 90 N.J. 85, 94 (1982).

The exercise of such Executive powers also entails responsibility which in the final analysis is reviewable by the electorate. In this manner, overall governmental policies and direction are held accountable and representative government is enhanced. Thus, the Governor and his agency heads must maintain decisional authority in areas that are essential to the proper functioning of the Executive Branch and to the development of administrative policy. These fundamental aspects of administrative law provide the foundation of our governmental structure and organization. The OAL is an essential party to this system. It coordinates and facilitates these vital processes for the State and its citizens.

VI.

STATE OF NEW JERSEY
EXECUTIVE DEPARTMENT

EXECUTIVE ORDER NO. 38

WHEREAS, the Office of Administrative Law was established in 1979 and charged with responsibility for overseeing specified functions within the Executive Branch; and

WHEREAS, the Office of Administrative Law was created with the intention that it should promote due process, expedite the just conclusion of contested cases, and generally improve the quality of administrative justice; and

WHEREAS, the size of the caseload within the jurisdiction of the Office of Administrative Law has increased dramatically since its inception; and

WHEREAS, the Office of Administrative Law adjudicates diverse issues, many of which have important consequences to members of the general public such as utility rates, professional licensing, driver's licenses and welfare benefits;

WHEREAS, legislation pertaining to the Office of Administrative Law is occasionally presented to me; and

WHEREAS, an evaluation of the performance of the Office of Administrative Law with regard to how it meets its legislative mandates has not taken place since the Office was created;

NOW, THEREFORE, I, THOMAS H. KEAN, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and by the laws of this State, do hereby ORDER and DIRECT that:

1. There is hereby created a committee to be known as the Governor's Committee on the Office of Administrative Law (hereinafter referred to as the "Administrative Law Committee").

2. The Administrative Law Committee shall consist of 13 members, which shall include: the Secretary of State, the Commissioners of Civil Service, Education, Human Services, the Director of the Division of Motor Vehicles, a representative of the Governor's Office, one representative or Administrative Law Judge of the Office of Administrative Law and six other members to be selected by the Governor. The Chairman and Vice Chairman shall be selected by the Governor from among the Committee membership. The members of the Administrative Law Committee shall serve without compensation.

3. The Administrative Law Committee shall study the following issues and make periodic reports to me on its findings and recommendations:

a. Any and all ways of improving the amount of time necessary to dispose of an administrative law case including, but not limited to, an analysis of whether separate and distinct procedures can be instituted to accommodate different types of cases.

b. Suggested means for dealing with the existing backlog of cases.

c. The necessity or desirability of instituting a requirement that administrative law judges be attorneys licensed to practice law in the State of New Jersey.

d. The appropriate atmosphere which should be fostered during administrative law hearings, (i.e., the degree to which formalized courtroom procedures, such as the wearing of robes, should be encouraged or discouraged).

e. The appropriate role of the Office of Administrative Law within the Executive Branch.

4. The Administrative Law Committee is authorized to call upon any department, office, division or agency of the State to supply such data, program reports and any other information, personnel or assistance as it deems necessary to discharge its responsibilities under this order. Each department, office, division or agency of the State is authorized to the extent not inconsistent with law, to cooperate with the Administrative Law Committee to furnish it with such information, personnel and assistance as necessary to accomplish the purposes of this order.

5. This order shall take effect immediately and shall expire one year after its effective date.

GIVEN, under my hand and seal this
7th day of April
in the Year of Our Lord, one
thousand nine hundred and eighty
three of the Independence of
the United States, the two
hundred and seventh.

/s/ Thomas H. Kean
GOVERNOR

(seal)

Attest:

/s/ W. Cary Edwards
Chief Counsel

STATE OF NEW JERSEY
EXECUTIVE DEPARTMENT

EXECUTIVE ORDER NO. 64

WHEREAS, Executive Order No. 38 created a Governor's Committee on the Office of Administrative Law; and

WHEREAS, the purpose of the Governor's Committee on the Office of Administrative Law is to undertake a comprehensive evaluation of the performance of the Office of Administrative Law with regard to how it meets its legislative mandates; and

WHEREAS, the proper adjudication by the Office of Administrative Law of many diverse issues of important consequence to members of the general public is of vital importance to the promotion of due process, the just conclusion of contested cases, and the general improvement in the quality of administrative justice in the State; and

WHEREAS, it is imperative that the Committee be given adequate time to thoroughly and completely perform its designated responsibilities;

NOW, THEREFORE, I, THOMAS H. KEAN, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and by the statutes of this State, do hereby Order and Direct:

1. Section 5 of Executive Order No. 38 is hereby amended as follows:

"5. The Committee shall submit a report of its findings to the Governor on or before July 7, 1984, accompanying the report with any recommendations it deems appropriate. The Committee may make interim reports concerning its study as it shall determine."

GIVEN, under my hand and seal
this 22nd day of March
in the Year of Our Lord
one thousand nine hundred
and eighty four and of the
Independence of the United
States, the two hundred
and eighth.

/s/ Thomas H. Kean

GOVERNOR

[seal]

Attest:

/s/ W. Cary Edwards

Chief Counsel

VII. LIST OF STATE WITNESSES

The Honorable Michael Cole
First Assistant Attorney General

The Honorable Mary Ann T. Burgess
Assistant Attorney General

The Honorable Audrey Harris
Director
Division of Public Welfare
Department of Human Services

The Honorable John F. Vassallo, Jr.
Director
Division of Alcoholic Beverage Control

The Honorable Joseph H. Rodriguez
Commissioner
Department of Public Advocate

Bart Bennett, Esq.
Assistant Director of Regulatory Affairs
Department of Environmental Protection

The Honorable Harold G. Handel
Executive Director
Division of New Jersey Racing Commission

The Honorable Pamela S. Poff
Director
Division on Civil Rights
Department of Law & Public Safety

The Honorable Dominick Mazzogetti
Deputy Commissioner
Department of Banking

The Honorable Walter M. Read
Chairman
New Jersey Casino Control Commission

The Honorable Barbara Curran
President
State Board of Public Utilities

The Honorable Scott Weiner
Executive Director
New Jersey Election Law Enforcement Commission

Mr. Eric Perkins
Special Assistant to the Chancellor
Department of Higher Education

The Honorable Terrance Moore
Executive Director
New Jersey Pinelands Commission

The Honorable Thomas M. Russo
Director
Division of Medical Assistance and Health Service
Department of Human Services

LIST OF PUBLIC WITNESSES

William S. Greenberg, Esq.
Private Practice

Steven I. Kern, Esq.
Private Practice

Vincent A. Maressa, Esq.
Executive Director and Legal Counsel
Medical Society of New Jersey

Vincent J. Dotali, Esq.
Private Practice

Richard F. Aronsohn, Esq.
Private Practice

Dr. John P. Delaney
Superintendent Woodbridge State School

Sheldon H. Pincus, Esq.
Private Practice

Richard S. Semel, Esq.
Legal Services

Joel Shain, Esq.
Chairman of the New Jersey State Bar
Administrative Law Section

George Frazza, Esq.
General Counsel of Johnson & Johnson
Member of Governor's Management Improvement Plan

James Scott Hill, Esq.
Counsel to Shanley & Fisher Member of
Governor's Management Improvement Plan

Atif S. Aktar
Private Citizen

Anthony Castaldo
Private Citizen

Richard McManus, Esq.
Private Practice

Nahum Litt
Chief Judge of the U.S. Department of Labor

Samuel J. Halpern, Esq.
Private Practice

WRITTEN TESTIMONY
PROVIDED BY

The Honorable John P. Renna
Commissioner
Department of Community Affairs

The Honorable Robert S. Kline
Deputy Director
New Jersey Division of Motor Vehicles

The Honorable William J. Joseph
Director
Division of Pension
Department of the Treasury

THE
STATE OF MINNESOTA

OFFICE OF
ADMINISTRATIVE HEARINGS

1975 - 1985

A REPORT ON THE FIRST DECADE

Duane R. Harves
Chief Administrative Law Judge

January 1986

Minnesota Office of Administrative Hearings
Suite 400, Summit Bank Building
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PREFACE

On December 31, 1985, the Minnesota Office of Administrative Hearings completed its tenth full year of operation. Those ten years followed five months of organizational preparation during 1975.

The office, independent from any other state agency and charged with the task of conducting fair and impartial hearings for a multiplicity of agencies, was one of the first of its kind to be created across the country, preceded only by California (1946), Massachusetts (1974), Tennessee (1974) and Florida (1974). There are now five more states which have what has come to be known as a central panel system for administrative hearings: Colorado, New Jersey, Washington, Missouri and, effective January 1, 1986, North Carolina. Sixteen other states and the federal government are in various stages of consideration of the establishment of a similar agency.

During the past ten years, there have been many changes in the field of administrative practice and procedures. These changes have occurred due to judicial decisions and legislative changes across the country and in Minnesota. As an example, the Minnesota Legislature has amended the Administrative Procedure Act (Minn. Stat. Ch. 14) every year since 1974, the only exception being 1978. As this report was being prepared, several Minnesota legislative committees were considering further amendments for enactment during the 1986 Legislative Session.

The purposes of this report are to provide a history of the Minnesota Administrative Procedure Act and its various amendments, to provide information on how the Minnesota office was initially organized and how it has operated, and to provide some perspective for the future, including recommendations for changes. It is the hope of this writer that this report will provide information and assistance not only to the Minnesota Legislature in its review of the present law, but to other jurisdictions which may be considering adoption of a similar agency.

It may appear to the reader that this report is a bit of "horn blowing" by the office. That perception is probably accurate as it is also intended to be a tribute to the many dedicated and professional employees of the office who have worked very hard under severe deadlines and tight fiscal constraints to achieve the successes chronicled in this report.

Chapter 1

Introduction and Historical Perspective

A. Introduction.

During the 1975 Legislative Session, the Minnesota Legislature passed major amendments to the Minnesota Administrative Procedure Act (APA) which included the creation of an independent agency which has, as its sole function, the conduct of administrative hearings. The agency, first called the Office of Hearing Examiners and now called the Office of Administrative Hearings (OAH), became effective on January 1, 1976.[1] It is the intent of this report to briefly review the history of the Minnesota APA prior to the 1975 changes, the legislative concerns which led to the 1975 APA amendments, the 1975 amendments themselves, the initial steps taken to implement the amendments and organize the OAH, legislative amendments to the APA since 1975, a review of the operation of the OAH over the past decade and a view to the future for both the OAH and the APA.

B. Historical Perspective

The current APA can trace its origin to 1941 when the Legislature passed what came to be codified as Minnesota Statutes 15.06(5) (1941). At that time, the law allowed the commissioner or head of any agency to prescribe rules and regulations for the conduct of the agency unless expressly forbidden by law. The only statutory requirement applicable to all rules was that they be "not inconsistent with law". The only uniform statutory command in the rule promulgation process was that any rules affecting persons other than the agency "be filed with the Secretary of State".[2]

During the Fifty-Third Session of the Minnesota Legislature in 1945, the first APA, as such, was passed into law.[3] Under the terms of that act, in order to promulgate rules or regulations agencies were required to hold a public hearing after first giving thirty days notice to interested persons who registered with the Secretary of State; the agencies were required to submit the rules to the Attorney General, with reasons for the rules; the Attorney General was required to approve or disapprove the rules based on a form and legality review; and the approved rules became effective thirty days after filing with the Secretary of State.[4] During the same Legislative Session, requirements for the publication and distribution of all administrative rules and regulations were also passed.[5]

The 1945 Act was substantially amended in 1957.[6] The 1957 Act was the first comprehensive APA in Minnesota which also added a requirement that adopted rules and regulations "be based upon a showing of need for the rule".[7] Another significant change, and major difference between the 1945 and 1957 acts involved the latter's attention to "contested cases", i.e., matters relating to the quasi-judicial functions of administrative agencies.[8]

Subsequent to 1957 and prior to 1975, the APA was amended several times. The Commissioner of Insurance, historically exempted from the rulemaking provisions of the APA, was placed under its requirements in 1961.[9] All of the health related professional and regulatory examining and licensing boards were placed under the APA rulemaking requirements in 1963.[10] In that same year, rules were required to be filed with the Commissioner of Administration as well as with the Secretary of State; rules established by state agencies not defined as within the APA's coverage would be without the force and effect of law unless filed in accordance with the APA; and the Commissioner of Administration was required to annually publish all administrative rules and regulations.[11] The Workmen's Compensation Commission was exempted from the APA in 1969.[12] In 1974, the State Register was established with the requirement that all notices of intended action, hearing notices and approved rules were to be published in it.[13]

During the period from the mid-sixties to the mid-seventies, the Legislature was also passing laws creating the right to an administrative hearing in many more areas of the law which required compliance with the contested case provisions of the APA. At the same time, the Legislature began to recognize the need for agency heads to be able to delegate the responsibility for conducting the hearings to other agency personnel by creating and specifically authorizing the use of hearing examiners within the agencies. In some instances, agencies were required to use hearing examiners to conduct the hearing with the added requirement that the hearing examiners could not be employees of the agency. Examples of legislation discussed above include:

1. The Public Service Commission was authorized to "hire employees as may be necessary" including hearing officers and court reporters in 1967.[14]

2. The Minnesota Department of Commerce was first authorized to hire hearing examiners in 1969 and to utilize them "where an appointive authority directs that the matter be heard by a hearing examiner."[15]

3. The Commissioner of the Minnesota Department of Human Rights was authorized to hire hearing examiners from outside of the agency and was required to assign discrimination hearings to them, for final determination, in 1967.[16]

4. In 1973, the authority for enforcement of certain nursing home safety and health laws and rules was transferred from the Commissioner of Public Welfare to the State Board of Health. Hearings on correction orders were required to be conducted by a hearing officer "who shall not be an employee of the state board of health."[17]

5. Also in 1973, the Occupational Safety and Health Review Commission was authorized to conduct hearings on appeals from citations of the Commissioner of Labor and Industry or to appoint hearing examiners to conduct the hearings.[18]

6. Numerous new environmental laws, requiring various hearings, were passed during the 1960's and 1970's, including the creation of the Minnesota Pollution Control agency in 1967.[19]

Thus, in the area of contested cases, the Legislature had been recognizing the need to provide due process rights to the citizens of the state together with the need to allow agencies to operate more efficiently and expeditiously when adjudicating these cases. Finally, the necessity of a totally impartial fact-finder and decisionmaker was recognized where an agency was viewed as being both the strict enforcer and prosecutor under certain areas of the law.

With this background, the Minnesota Legislature began its comprehensive review of the APA which led to the 1975 amendments.

Chapter 2

The 1974-1975 Amendments

During the 1974 Legislative Session, Representative William "Bill" Quirin, Chairman of the House Governmental Operations Committee and his counterpart, Senator Edward Gearty, Chairman of the Senate Governmental Operations Committee, agreed that a joint House/Senate review of the APA would be appropriate.[20] A draft of proposed changes was prepared for dissemination and comment and was sent especially to all state agencies.[21] The Administrative Law Section of the Minnesota Bar Association was also requested to participate in the review and comment through its then-chairman William Brooks. Mr. Brooks had been pursuing the concept of a separate and independent agency of hearing examiners since approximately 1964 when he was a member of the Attorney General's staff.[22] Other very active, supportive participants in the process included representatives of Governor Wendell Anderson's staff, the Minnesota Association of Commerce and Industry through its representative James "Ted" Shields, Attorney General Warren Spannus' office through his representative Assistant Attorney General J. Michael Miles, and former legislator (who had authored APA legislation during the 1950's) Peter S. Popovich.[23] The unenvious task of preparing the many drafts of the proposed changes, soliciting and reviewing written comments, scheduling of hearings and responding to innumerable requests for information during this period fell on the shoulders of James Nobles[24], from the House Research staff and Thomas J. Triplett[25] of the Senate Counsel's staff.[26]

Upon receipt of the draft of proposed changes, which included the removal of all exemptions from the APA, the state agencies were requested to submit samples of their agency guidelines, interpretive opinions and policy statements. They were also required to come forward with any and all reasons why their agency, or specific programs within their agency should be exempted from the APA. These written responses were compiled by Messrs. Nobles and Triplett and presented to the members of the joint committee. Agencies also presented oral testimony at the hearings.[27]

The major impetus to changing the APA was what was perceived to be violations of the rulemaking provisions of the APA. The joint committee discovered numerous instances of the issuance of agency guidelines or policy statements which had been issued by agencies without any public participation in the process. These guidelines and policy statements were then being enforced by the agency as though they were properly adopted rules having the force and effect of law. Examples included:

1. On May 17, 1971, the Department of Public Welfare adopted a statement of "official policy" on the performance of prefrontal lobotomies on patients in state hospitals.

2. In November 1973, the Board of Education published its "Guidelines for the Collection, Maintenance and Release of Pupil Records" which defined limitations on the accessibility of certain personal student files.

3. On November 20, 1973, the State College Board issued its "Operating Procedure 19" which permitted the consumption of alcoholic beverages in residence halls and in other academic buildings for "special occasions".

4. On June 7, 1974, the Department of Revenue, Income Tax Division, issued a memo to its tax examiners relating to rent credits specifying that tenants who rent from relatives must have entered into the lease arrangement at arms length in order to be eligible for the credit.[28]

As a result of the hearings, major changes were made to the APA by the 1974 and 1975 Legislatures. Among the more significant changes were the following:

1. A Legislative Commission to Review Administrative Rules (LCRAR), to be comprised of five members of the Senate and five members of the House was created in 1974. The LCRAR was given authority to review agency rules and to suspend the rules if the LCRAR found it appropriate to do so. Thereafter, the rules were to remain suspended until the next regular legislative session where a bill permanently repealing the rules was required to be passed by both bodies and signed by the Governor or the suspended rules would become effective again.[29] (This provision remains in effect today with very minor changes having been made.[30])

2. The definition of rule was changed by deleting the word "regulation", which was a redundancy and confusing, and by broadening the definition to ensure that it included "every agency statement of general applicability and future effect", which was intended to include all agency guidelines and policy statements.[31]

3. The Office of Hearing Examiners was created as an independent agency within the executive branch of government to be headed by a chief hearing examiner (now called the chief administrative law judge).[32]

4. The chief hearing examiner was given authority to adopt procedural rules for both rulemaking and contested case hearings which rules were to supersede all other agencies' rules which may be in conflict.[33]

5. All rulemaking hearings were required to be conducted by a hearing examiner (now called an administrative law judge) who could, subject to review by the chief hearing examiner, effectively stop rules from being adopted under certain circumstances. All rules were required to be adopted only after a hearing was conducted.[34]

6. All hearings falling within the APA definition of "contested case" were required to be conducted by a hearing examiner who was to prepare a recommended action to the agency, except where other laws required the hearing examiner's report to have finality.[35]

7. Exemptions from the rulemaking provisions of the APA were provided for rules relating solely to the internal management of an agency, rules of the game and fish division of the Department of Natural Resources, rules relating to weight limitations on the use of highways, and opinions of the Attorney General.[36]

8. While there was only one specific exemption from the definition of "contested case" in the APA, several exemptions from the APA itself were maintained. These included any agency having less than statewide jurisdiction (i.e. the Metropolitan Council), agencies in the legislative or judicial branches, certain emergency powers of the Governor, the Minnesota Corrections Authority and Pardon Board, the Department of Employment Services (i.e. unemployment compensation matters), the Director of Mediation Services, the Workers' Compensation Division of the Department of Labor and Industry, and the department of military affairs. The only specific exemption from the contested case provisions was for the Minnesota Municipal Commission.[37]

Chapter 3

The Office of Administrative Hearings

As briefly stated in Chapter 2, the 1975 amendments to the APA created the Office of Hearing Examiners. It was established as an independent agency within the executive branch of government and charged with the responsibility of the conduct of all administrative hearings required to be conducted pursuant to the APA.[38]

In a further effort to ensure the independence of the office and to remove it, as much as possible, from any political pressures, two significant sections were included. First, at a time when the Legislature had been reducing agency head terms of office from six to four years to be coterminous with that of the Governor, the position of the chief hearing examiner was created to be appointed by the Governor, with the advice and consent of the Senate, for a six-year term ending on June 30th of the sixth calendar year following the appointment. Second, all persons appointed as hearing examiners were to be in the classified or civil service system, were required to be free of any political or economic association which would impair their ability to function in a fair and impartial manner and were required to be "learned in the law" if conducting contested case hearings.[39] These provisions remain in the law today.

In response to the critics who feared that there would be a loss of expertise and thus the creation of delays in the process, the legislation included a "grandfather clause" which mandated that all persons then serving as hearing examiners in state agencies and who were otherwise eligible for appointment were transferred to the office if their agency was not exempt.[40] Additionally, a requirement was added which directs the chief hearing examiner, when making case assignments, to assign persons with expertise in the subject matter of the hearing whenever possible.[41]

Because costs of the administrative process were of concern, the office was given an initial appropriation of only $167,000 to be used during the organizational phase of its operation and as "start-up" funds once the effective date occurred.[42] Thereafter, all funding is to be from a direct charge to the agency for which a hearing is being conducted.[43] A further cost-related provision allows the chief hearing examiner to contract with qualified persons to serve as hearing examiners when regularly appointed hearing examiners are not available.[44] This latter provision was to enable the office to hire full-time staff to cover the normal hearing schedule rather than hiring staff to cover the peak periods and having less than a full caseload at other times.

Prior to 1975, all agencies had their own procedural rules, most of which were similar to model rules proposed by the Attorney General, but all having their own unique sections. The 1975 Act required the chief hearing examiner to adopt procedural rules for both rulemaking and contested case hearings.[45] Once adopted, these rules superseded any other agency's rules which were in conflict. This provision was a response to the complaints that a multiplicity of procedural rules existed which required parties to purchase and be familiar with different procedural rules for each agency.

The act also provided specific authority to the chief hearing examiner to utilize court reporters to keep the record at all hearings or to use audio magnetic recording devices if deemed appropriate. Discretion was given to the chief hearing examiner to maintain a staff of court reporters.[46]

Finally, the act, passed in the late spring of 1975, required the Governor to appoint the chief hearing examiner by July 31, 1975. The rest of the Act's requirements became effective on January 1, 1976.[47] This was to provide sufficient time for the appointee to organize the office, adopt the procedural rules and to give the various state agencies time to prepare for the required changes. Governor Wendell Anderson appointed this writer as acting chief hearing examiner on July 25, 1975.

As will be discussed in Chapter 6, the title of the office was changed to the Office of Administrative Hearings by the enactment of 1980 Minn. Laws, Ch. 615. While the "official" reasons for the title change was that it would be much more descriptive of the work actually performed by the office, other reasons were also given. The primary reason for the change, at least from the perspective of the personnel of the office, was the fact that the public many times assumed that our office had something to do with impairments in hearing or that we regulated hearing aid dealers. Adding to the confusion was the fact that two of the three floors of the building housing our office were occupied by Minnesota Services for the Blind. The change in title effectively solved this misconception problem.

Chapter 4

Organizing the Office

Although the official appointment to the position of chief hearing examiner was made on July 25, 1975, on the previous day the Governor had informed persons of his selection and had requested the Commissioner of Administration to assist the new appointee in the organization of the office. That Commissioner, Richard Brubacher, arranged a meeting for the chief hearing examiner with the directors of several divisions at the Department of Administration. That meeting was held on the day before the official appointment by the Governor. The purpose of the meeting was to introduce the appointee to the various division directors and to provide immediate assistance in a number of areas. The most obvious and pressing needs were to find office space for the appointee, office furniture, and to have telephone equipment installed. While under normal circumstances such tasks would take anywhere from two to three weeks, within 24 hours the Commissioner of Administration had found space for the chief hearing examiner to sublease from the Minnesota County Attorney's Council, which was located one block from the State Capitol. At the same time, arrangements were made to temporarily rent furniture from the same council and the normal "red tape" was cut so that at 8:00 a.m. on July 25, 1975, the telephone lines at the new Office of Hearing Examiners were installed and working. At the same time, the Commissioner provided direct assistance so that the chief hearing examiner could obtain immediate office supplies.

Besides enlisting the aid of the Commissioner of Administration, the Governor also requested the Commissioner of Personnel to provide immediate assistance to the chief hearing examiner in any and all personnel related matters. Michael C. O'Donnell, then acting commissioner of personnel, directed his staff to provide whatever assistance was necessary and to do so in an expedited fashion. He, like Commissioner Brubacher, set up an immediate meeting with the directors of the various divisions at the department who then proceeded to assist the chief hearing examiner in the preparation and completion of all paper work necessary to the establishment of the position and continued this assistance on an "as needed" basis.

There can be no doubt that without the cooperation of Commissioners Brubacher and O'Donnell, the directives to their staffs to provide immediate assistance, and the able assistance of those staff persons too numerous to mention, the implementation of the 1975 APA amendments, by January 1, 1976, would not have occurred.

One of the initial tasks in organizing any new agency is to determine the number of personnel which will be required to carry out and implement the provisions of the enabling legislation. In order to accomplish this task, it was necessary to obtain information and data from every agency of state government as it related to the conduct of administrative hearings which had been conducted in the past, along with estimates for the number and length of hearings which were anticipated to be conducted after January 1, 1976. In order to ascertain these numbers, each agency was contacted by telephone to set up an appointment for the chief hearing examiner to meet with the department head or designee and appropriate staff persons who could provide answers to the questions relating to hearings. Because the Governor had issued a directive relating to full cooperation in the establishment of the new office, all state agencies were well prepared for these meetings and provided what information they had available. At the same time, to verify the information which was being obtained from the agencies, the Attorney General's office was asked to survey all of its personnel, who were requested to go back through their records to determine the number of hearings they had been involved with for all of the agencies. The numbers obtained from the agencies were very close to the numbers obtained from the Attorney General's office.

After approximately two months of meetings, during which time the first draft of procedural rules were also being prepared and published, it was determined that the office could anticipate approximately 2,000 hearings each year. After attempting to analyze the length of the hearings involved, the California Office of Administrative Hearings, an office similar in scope, was consulted to compare the caseload numbers, anticipated hours per hearing, and an organizational structure. Upon obtaining information from that office, the Department of Personnel was consulted and it was determined that the office should be initially staffed with a total complement of 35 positions, which was to include the chief hearing examiner, a deputy chief hearing examiner, 15 hearing examiners, 10 court reporters, an administrative assistant, and seven additional support staff positions to provide typing support for the hearing examiners, receptionist responsibilities, a financial clerk to be responsible for the billing of agencies, and typists to provide transcriptions of tape recorded hearings. Once these numbers had been established and approved by the Department of Personnel, it was necessary to draft position descriptions for each of the proposed positions. Again, the staff of the Department of Personnel provided not only input for the position descriptions but assisted in the actual drafting of the position descriptions in order to expedite the process. Once the position descriptions were completed and approved, it was necessary to publish the vacant positions in the bulletin in order that persons could submit applications for consideration for hire.

As indicated earlier, the 1975 legislation provided for an automatic transfer to the office of those persons presently serving in the position of hearing examiner in other state agencies. The Commissioner of Personnel assisted in locating these persons. Meetings were held with these individuals shortly after the appointment of the chief hearing examiner and continued until the transfer. It was established that five persons from the Public Service Commission and one from the Minnesota Department of Commerce were eligible for transfer. At the same time, as the office was intending to maintain a court reporter system, persons presently serving as court reporters in state service were not automatically transferred by the law but, rather, were eligible for appointment to the positions if they applied. Therefore, meetings were also held with these individuals in order to inform them of the intended policies of the newly created agency so they might be able to make their decision on applying for positions.

The hiring of court reporters led to some controversy . In the past, court reporters at the Public Service Commission had been allowed to keep the proceeds from the sale of all transcripts they had prepared and which had been sold to the public. As the newly-created agency's enabling legislation provided that the fees for all services were to go to the office revolving account, it was the established policy of the agency that any fees for the transcription of the record of any hearing would go to the revolving account in the state treasury and not to the individual court reporters, who were classified employees of the state. As a result of this provision, several of the court reporters at the Public Service Commission chose to seek other non-state employment or to transfer to the Department of Labor and Industry, Workers' Compensation Division, where the court reporters were allowed to keep the proceeds from the sale of transcripts from those hearings.

Enabling legislation specifically authorized the chief hearing examiner to utilize audio magnetic recording devices for hearings where it was deemed appropriate. During 1975, the first four-track audio magnetic hearing recorders were available on the market. Because it was assumed that the majority of the hearings would utilize court reporters and because the four-track systems were untested in terms of reliability, a limited number of the four-track systems were purchased. Again, the staff of the Department of Administration provided able assistance in preparing and expediting the necessary documents which allowed the office to obtain equipment prior to January 1, 1976.

One of the factors that most people fail to think about when a new agency is created is the cost of the purchase of desks, chairs, typewriters and other necessary reusable office equipment, as well as office supplies. The purchase of office equipment was expedited through the Procurement Division of the Department of Administration. A more difficult task was trying to determine the amount of office supplies which would be necessary. It did not appear that anyone within state government had any usable data on exactly how many paper clips, pens, pencils, legal pads, rulers, scissors, staples, etc., are used by an employee in a specific position in state government. Therefore, the ordering of such mundane yet absolutely necessary supplies became a real guessing game. At the same time, having a legally trained person trying to figure out exactly what type of pencils, pens, and other secretarial supplies were most appropriate became almost humorous. Luckily, the first employee hired by the chief hearing examiner was an administrative secretary who had previously served in the same position at the Department of Commerce and who had much experience in not only dealing with the necessity for support staff supplies but in providing secretarial services directly to the new appointee.

Sandra Haven had previously worked as a secretary to the newly-appointed chief hearing examiner while he worked at the Department of Commerce, and also had experience as the administrative secretary to the Chairman of the Minnesota Department of Commerce prior to her transfer to the Office of Hearing Examiners. Her experience, and thereafter advice and assistance, in the organization of the newly-created office proved to be invaluable.

One would think that obtaining office space for a newly-created state agency would be an easy task given the usual "glut" of office space available and the desirability of a state agency as a tenant. However, given only five months to have the facilities available and the number of private offices necessary, finding and designing office space was one of the more difficult tasks in the organization of the office. It was assumed that finding office space would be much easier but we had begun looking for the space immediately. Several locations were found and designs were drawn for the office. However, for one reason or another, the proposed lessors dropped from consideration when faced with a January 1, 1976, deadline. Once again, the Department of Administration, Real Estate Management Division, provided able assistance and, eventually, adequate space at a very nominal charge was located within the city of St. Paul. However, it was not until November 11, 1975, that the space was found. Leases had to be prepared and signed before any work could be accomplished.

Once the office space had been located, equipment and supplies ordered and procedural rules adopted, the task of filling vacant positions commenced. Interviews were held during the month of November of 1975. When hiring the first hearing examiners, an attempt was made to find persons with expertise in different areas of the law so that the office could commence its operation with a wide variety of expertise. This proved to be a difficult task in one area but the office was able to find an individual with an excellent background in environmental law to assist in establishing an environmental unit within the office. Probably due to the minimal salaries which were available at the time, the number of applicants for the positions was considerably less than had been anticipated. However, the quality of the applicants was at an extremely high level and gave the chief hearing examiner a sufficient number of persons to choose from.

While it was the intent to organize the office into units for the purpose of supervision and for the purpose of maintaining or establishing expertise in certain subject matters, it was determined that with the exception of the environmental law area, the chief hearing examiner would personally supervise all individuals until such time as appointments to the supervisory positions could be determined. Therefore, the initial organizational structure was not implemented until sometime after the office had gained some experience.

In hiring individuals to the hearing examiner positions, it was anticipated that the number of hearings forecasted by the agencies was correct. Unfortunately, when providing data on the anticipated hearings, the numbers which had been provided by the agencies were somewhat inflated which created immediate problems. Using the usual 20-20 hindsight, where the office hired 14 full-time and one part-time hearing examiner, no more than ten hearing examiners should have been initially hired, leaving the balance of the positions vacant to be filled as the need would arise. As an example, the position of assistant chief hearing examiner was not initially filled and eventually that position was cancelled. Three court reporter positions were not initially filled and, as will be seen later, were never filled once a time/cost study had been accomplished.

The office began receiving its first requests for the assignment of hearing examiners during the month of December of 1975. Because there were six hearing examiners who were to be transferred to the office who had experience, the office was able to accommodate these requests as they were made. Likewise, we were able to project into the future and assign hearings to persons who were to be newly-hired on January 1, anticipating that they would be fully trained by the time their hearings were to be conducted. Thus, the actual receipt of requests for hearings, assignment of hearing examiners, and calendaring and docketing procedures were implemented prior to the effective date of the office. Fortunately, prior to the requests being received, an office policy and procedures manual had been prepared which established both a billing system and a calendaring procedure.

The adoption of the procedural rules was accomplished through the assistance of George Beck, a hearing examiner at the Department of Commerce who was to be transferred to the office; Howard L. Kaibel, Jr., the first hearing examiner to be hired by the office; J. Michael Miles, Assistant Attorney General assigned to the Office of Hearing Examiners; Ted Shields of the Minnesota Association of Commerce and Industry; and William Brooks, Chairman of the Administrative Law Section of the Minnesota Bar Association as well as other members of that association. These persons provided assistance in discussions of what the rules should contain, what they should look like, and how they should be proposed, as well as providing valuable comments on the various drafts. The first hearing was held in the late fall, which led to changes in the rules. The comments received at the hearing also led to the office proposing more substantial amendments to the rules at a second rulemaking proceeding conducted in December.

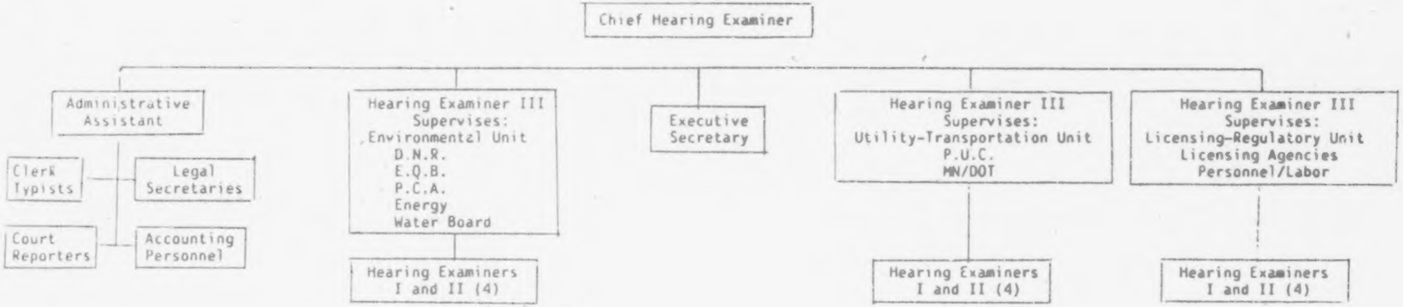
The first rulemaking hearing was attended by a large number of persons interested in the administrative process. The largest number of persons in attendance represented agencies. The other persons in attendance were members of the Administrative Law Section of the Bar Association and other representatives of associations with a high degree of interest in the administrative process. At the second rulemaking hearing where amendments to the initial rules were proposed, a much smaller number of persons attended due to the limited scope of the proposed amendments. In both proceedings, all participants came prepared to suggest modifications or other changes to the rules to make them more workable and easier to understand. The initial rules were adopted and effective prior to January 1, 1976.

The initial organizational structure of the Office of Hearing Examiners was as indicated in the chart at the end of this chapter.

From the initial appropriation of $167,000, $86,134.56 was expended prior to January 1, 1976, during the organizational phase of the office. This left $80,865.44 to begin operations on January 1. The breakdown of the organizational costs is as follows:

A. Furniture		
1. Desks	$11,472.92	
2. Chairs	7,382.28	
3. Filing Cabinets, Shelving, Bookcases	3,821.00	
4. Credenzas and Tables	3,350.02	
5. Miscellaneous	1,946.45	
6. (Less Transfer at Later Date)	(492.45)	$27,480.22
B. Equipment		
1. Typewriters	$ 5,008.50	
2. Dictation Equipment	6,472.50	
3. Hearing Recorders	14,583.15	
4. Office Machines	338.92	
5. (Less Later Transfer)	(1,000.00)	$25,403.07
C. Office Set-Up Supply Expenditure		
1. General Supplies	$ 2,542.00	
2. Law Books	7,497.00	
3. Telephone Installation	848.00	$10,887.00
D. Operational Costs - July to December 1985		
1. Salaries	$19,197.27	
2. Miscellaneous Operational Expenses (Rent, supplies, telephones, etc.)	3,167.00	$22,364.27
GRAND TOTAL		$86,134.56

MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
ORGANIZATION STRUCTURE
AS OF JANUARY 1, 1976


Chief Hearing Examiner
Administrative Assistant
Clerk Typists
Legal Secretaries
Court Reporters
Accounting Personnel
Hearing Examiner III Supervises: Environmental Unit D.N.R. E.Q.B. P.C.A. Energy Water Board
Hearing Examiners I and II (4)
Executive Secretary
Hearing Examiner III Supervises: Utility-Transportation Unit P.U.C. MN/DOT
Hearing Examiners I and II (4)
Hearing Examiner III Supervises: Licensing-Regulatory Unit Licensing Agencies Personnel/Labor
Hearing Examiners I and II (4)

Chapter 5

The First Year

On January 2, 1976, the office opened its doors for business. The first weeks, as was anticipated, were a bit chaotic. On January 2, only two telephone lines had been installed because our telephone "order" had somehow gotten delayed in processing. This problem was quickly solved after the Chairman of the Public Service Commission, Karl Rolvaag, found it impossible to get through to our office to schedule hearings. One call from the PSC led Northwestern Bell Telephone Company to authorize overtime to employees for the first time in eighteen months. By the evening of January 4, all phone lines were in and working.

Another problem was furniture. It was not fully delivered until after the first week. In the interim, the employees shared what desks we had available, everyone taking the initial "glitches" in good stride.

On January 2 and 3, the office held orientation sessions for the employees. These sessions included going through the office policy and procedures manual and the newly adopted procedural rules. We invited representatives of the Department of Personnel to participate. They went through, in great detail, the personnel laws and rules which proved to be invaluable to our employees. Another very valuable part of the initial orientation was given by a representative of the insurance agency which was responsible for all employee insurance. A representative of the State Capitol Credit Union participated by explaining the operation of the credit union and answering any and all questions. All of these persons provided valuable information to the employees and responded to questions which the office administration would otherwise have had to answer on a case-by-case basis.

For the purpose of training newly hired hearing examiners with little or no experience, we assigned one experienced hearing examiner to two with less experience. The "rookie" examiners attended hearings conducted by the "veteran" examiner, thereafter asking any questions about the proceedings and discussing the case itself to gain a better understanding of the law which was the subject of the hearing. When the "rookie" examiners conducted their first hearings, the "veteran" sat in on the hearing, took notes, and later prepared a written critique of the proceedings, providing a copy to the chief hearing examiner.

In order to insure uniformity in format and a grammatically correct and understandable work product, prior to the issuance of any hearing examiner's report, it was reviewed by the chief hearing examiner. This review was primarily for the purpose of insuring readability, correct spelling and grammar, and uniformity of format but also was for the purpose of insuring that all reports contained the conclusions of law necessary to reach a decision and that each conclusion was supported by one or more findings of fact. (This pre-issuance review has continued to the present time and is now accomplished by the ALJ supervisors or the Chief ALJ in their absence. It has proven to be a very effective quality control procedure.)

One problem which was evident very early was the misconception, by some, of what constituted a true finding of fact. We found that some training in this regard was necessary and attempted to provide it through this review. Another problem which emerged was the propensity of some examiners to use language in their reports which could be and was viewed by some as demeaning to one party or another. This led to the establishment of a written policy of the office which prohibits the use of language in a report which could be viewed as a "cheap shot" at a party. While some examiners expressed initial concern over the policy, compliance was obtained and the policy remains in effect at this time.

As alluded to in the previous chapter, when providing data on the number of anticipated hearings, agencies had inflated their numbers somewhat. Additionally, the Department of Public Welfare refused to refer its recipient cases to the office because it took the position that their law superseded the APA amendments and later because of the claim that there would be a loss of federal funds if someone else conducted these hearings. The department subsequently obtained a letter from the regional office of the U. S. Department of Health, Education and Welfare threatening the loss of federal funding unless an exemption was granted. The letter came to light very late in the 1976 Legislative Session and resulted in the passage of a bill exempting the federally funded assistance programs from the APA.[48] This resulted in the loss of approximately 500 contested case hearings annually.

A second loss of approximately 600 anticipated hearings was the result of the Department of Corrections seeking and obtaining an exemption for its hearings "involving the discipline or transfer of inmates or other hearings relating solely to inmate management".[49] This exemption, as well as the DPW exemption, remains in the law as of this date.

Two other agencies did not refer cases to the office as had been anticipated. The Department of Revenue simply put a number of its hearings "on hold" until it could seek legislative clarification. This clarification did not occur until the 1977 Legislative Session when it was determined that a few of its "contested cases", primarily in the area of iron ore and petroleum taxes, would be exempted but that the rest of its hearings were to be APA hearings.[50] The other agency not referring all of its cases to the office was, and remains, the Department of Public Safety. That agency has taken the position that because the commissioner has authority to summarily revoke or suspend a person's drivers license upon a finding that the driver is an unsafe driver, the right of the driver to a subsequent hearing is not a contested case under the APA.[51]

Another source of anticipated hearings which failed to materialize were those involving the implied consent law. As initially proposed by its author, Senator Alec Olson, the bill was to provide the right to an administrative hearing upon request. While the legislation was pending very late during the 1976 Legislative Session, Senator Olson had a meeting with the chief hearing examiner, a representative of the Department of Public Safety Drivers License Division, and the Special Assistant Attorney General assigned to that division. The purpose of the meeting was to discuss an appropriation for the hearings. The department, not very happy with the thought of another agency conducting its hearings, prepared a fiscal note wherein it projected an extremely high number of hearings and a cost for those hearings of two million dollars. As a result of those numbers, which later proved to be extremely inflated, Senator Olson amended his bill to require the implied consent hearings to be conducted by the municipal and county courts where they continue to be heard as of this date.[52]

Because the office was initially staffed in anticipation of a level of hearings which failed to materialize and an hourly charge established based upon a presumed number of billable hours, the office ran into a severe financial crisis within the first six months. Several steps had to be taken immediately. First, two hearing examiners were transferred to vacant attorney positions at the Department of Labor and Industry. A third examiner originally scheduled for the same transfer chose to return to the private practice of law. As we were preparing a similar reduction in support staff, two of the legal secretaries chose to transfer to other agencies. Second, a restructuring of the billing rate was implemented in order to bring solvency to the office's revolving account and to insure its stability at least through fiscal year 1977. These steps proved to be sufficient to resolve both the immediate and long-term problem.

As a result of the financial problems discussed above, the office began an in-depth look at all of its expenditures, hearing procedures and every other aspect of its operation. Two items of expense which were very large were court reporters and travel. The study of these two expense items resulted in cost saving proposals in both areas.

First, a time and cost study of the use of court reporters who were employees of the office versus the use of audio-magnetic recording devices and court reporters from the private sector was completed. It was found that the cost of the "in-house" court reporters' work product, one page of transcript, was in excess of $5.00 per page. Because of the lower costs charged by the private sector with whom we were in competition, we were unable to bill for 100% of our costs. Thus, the hourly billing rate for hearing examiner services was actually subsidizing the costs of maintaining an "in-house" court reporter system. We were only recouping $2.40 per page of typed transcript or a loss of in excess of $2.60 per page. To alleviate this problem, we initiated a written lay-off notice to all of our employee court reporters. All but two were able to secure other employment. Because these two had many years of governmental service and were experienced in utility rate hearings (where we came the closest to recouping our costs), we withdrew the lay-off notice to them. (These reporters remained on our staff until 1982 when they, along with reporters who had been transferred to the office in 1981 in the workers' compensation reform bill, were laid off due to abolishment of their positions as part of the budget reductions during the 1981 Third Special Session.)

The second action taken was a study of the nature and type of hearings we were conducting, especially those requiring any travel. We found several things which led to subsequent changes, some requiring legislative action and the other requiring better prehearing techniques by the examiners. The first thing we discovered is that we were traveling all over the state to conduct hearings where there were no adversarial parties. The second discovery was that a high number of cases were settled just prior to our starting the hearing.

In the first instance, our study showed that while we were supposedly conducting "contested" hearings, in many instances there was no opposing party and the hearing was nothing more than an oral repetition of information already contained in a written application required to be filed with an agency, which was then required to conduct an administrative hearing prior to acting on the application. We found these types of provisions in a number of agencies' statutes when the agency was requested to issue some type of license, permit or certificate of authority. After identifying the laws and the agencies involved, we met with the agencies to discuss a proposal to eliminate the need for these hearings except where necessary. After securing their agreement, an omnibus bill was drafted and passed by the 1977 Legislature which deleted the necessity for hearings in these cases except when there was opposition to the application or when the agency denied the application based on its written contents. The agencies were given discretion to initiate a contested case where deemed appropriate. This became known as the "uncontested-contested case" procedure.[53] This same procedure has been introduced into other statutes in subsequent legislative sessions.

In order to alleviate the problem of parties waiting until the hearing to discuss settlement of their differences, the office began to pursue various methods of getting the adversaries to discuss the case earlier. In many instances we had found that parties were unaware that an administrative hearing could be settled or that they could even talk to the agency representative prior to the hearing. There was also the fear that if one side initiated settlement discussions, it would be perceived as evidencing a weakness in their case. One successful method was to increase the use of prehearing conferences, both in person and by telephone, the latter when one party would have to travel more than 50 miles to attend the conference. Agencies were a little reluctant at first because they believed it would increase costs. After a short time, seeing the success of these conferences in saving both time and money, they actually began requesting us to hold a prehearing conference when they referred a case to us.

Another step taken to facilitate settlements has been the issuance of a prehearing order in certain cases which required the applicant for some type of permit to contact the opposing party to discuss settlement no later than ten days prior to the hearing. They then are required to report the results to the examiner. A failure to comply results in the case being continued. This procedure has resulted in an increase in early settlements in transportation cases of approximately 50%. The obvious result is a savings of both time and costs to all concerned.

As the first year drew to a close and the office prepared for the 1977 Legislative Session, which would be the first budgetary session for the office, a detailed report was prepared. The report analyzed not only budgetary information but also included statistical data on the number of cases received and the dispositions, as well as a breakdown of our billings, by agency. From the charts which follow, it can be seen how the workload of the office started out much lower than had been anticipated but slowly increased to the point where the office was operating at nearly full capacity by the end of the year.

CASES OPENED AND CLOSED
CALENDAR YEAR 1976

MONTH	OPENED	CLOSED	PENDING
January	159	14	145
February	57	32	170
March	50	51	169
April	65	47	187
May	67	37	217
June	85	69	233
July	66	61	238
August	85	55	268
September	86	79	275
October	74	43	306
November	60	94	272
December	47	72	247
Total	901	654	

SUMMARY OF BILLABLE HOURS
AND
TOTAL TRANSCRIPT SALES, BY MONTH

MONTH	BILLABLE HOURS	COURT REPORTER HOURS	TOTAL TRANSCRIPT SALES	TOTAL PAGES SOLD
January	718.1	310.5	$ 748.00	612
February	888.4	241.1	1,687.25	1017
March	1042.5	278.0	2,697.30	4074
April	1420.2	200.4	2,544.85	1273
May	1107.8	133.1	6,285.82	4447
June	1333.3	78.8	9,454.50	4426
July	1398.8	25.2	3,374.15	3020
August	1498.2	66.5	4,225.70	3561
September	1484.7	55.7	2,476.25	2075
October	1299.3	38.6	1,804.25	1541
November	1579.6	47.6	2,503.85	2152
December	1628.5	49.9	2,264.75	1835
Total	15,399.4	1525.4	40,066.67	30,033

AGENCY EXPENDITURES FOR HEARING EXAMINERS AND COURT REPORTER EXPENSES

AGENCY	FILES OPENED	FILES CLOSED	HE BILLED HOURS	HE TOTAL CHARGES	COURT REPORTER AND TRANSCRIPT CHARGES	TOTAL CHARGES
Attorney General	1	1	11.6	$ 464	0	$ 464
Agriculture	14	8	133.5	6,335	$ 168	6,503
Architects, Bd. of	3	3	47.6	1,846	27	2,116
Building Code	6	3	27.9	994	23	1,017
Board of Nursing	8	5	53.7	2,148	140	2,288
Board of Pharmacy	3	3	3.7	123	0	123
Board of Teaching	1	1	15.5	620	125	745
Veterinary Medicine	1	1	11.6	464	0	464
City of St. Paul	1	1	29.0	1,160	0	1,160
Cable Communications	2	2	119.7	3,287	0	3,287
Chiropractic Board	3	3	30.3	1,202	0	1,202
Commerce						
Commerce Commission	13	12	595.8	19,285	4,398	23,683
Banking	7	7	113.4	3,833	68	3,901
Insurance	17	6	262.4	8,890	2,869	11,759
Securities	43	29	316.3	10,606	1,291	11,897
Consumer Services	1	0	18.1	724	173	897
(Total Commerce)	(81)	(54)	(1306.0)	(43,338)	(8,799)	(52,137)
Corrections	1	0	6.1	244	0	244
Dentistry Board	4	4	35.3	1,412	0	1,412
Natural Resources	4	3	172.6	6,419	0	6,419
Public Safety	3	3	77.3	3,092	0	3,092
Transportation	1	0	3.8	152	0	152
Public Welfare	42	26	852.0	33,584	958	34,542
Revenue	9	7	170.1	6,804	212	7,016
Veterans Affairs	9	7	79.5	3,012	75	3,087
Energy Agency	8	2	485.6	19,556	2,099	21,655
Education	4	3	111.7	4,468	141	4,609
Ethical Practices	2	2	67.5	2,658	0	2,658
Environmental Quality	15	10	1034.5	39,099	2,078	41,177
Higher Education	2	2	144.1	5,285	0	5,285
Housing Finance	1	0	.3	12	0	12
Health Department	73	47	628.6	24,195	177	24,372
Human Rights	41	22	267.6	10,139	413	10,552
Highway Department	6	4	170.5	6,281	0	6,281
Labor & Industry	6	3	99.6	3,433	266	3,699
Livestock Sanitary Bd.	2	2	17.5	595	0	595
Metropolitan Council	1	1	122.9	4,916	0	4,916
Mpls. Public Schools	3	3	17.8	712	0	712
Nursing Home Admin.	3	1	30.2	793	0	793
Optometry Board	2	1	8.2	328	0	328
OSHA	134	97	1119.1	38,261	344	38,606
Personnel Board	6	4	80.5	2,902	0	2,902
Pollution Control	10	4	283.5	10,211	148	10,359
PERB	2	2	15.5	620	110	730
State Planning	3	3	132.5	5,394	60	5,454
Peace Officer Training	1	1	19.4	815	0	815
Public Service Comm.	357	290	6796.6	264,297	20,954	285,251
Psychology Board	1	1	5.9	236	15	251
State Register	1	1	79.9	1,838	0	1,838
State Arts Board	1	0	3.5	140	15	155
Cosmetology	9	5	52.5	1,986	150	2,136
Medical Examiners	7	6	289.6	11,086	864	11,950
Designer Selection	1	1	9.3	372	0	372
Secretary of State	1	1	70.9	2,655	0	2,655
State University Bd.	1	1	7.0	280	0	280
Total	901	654	15,359.1	$580,263	$38,604	$618,865

Chapter 6

1977 - 1981

The next five years of operation brought a stabilization to the operation of the office. The following table gives a picture of the office's operation during that time period. (For the purpose of this and subsequent tables, the information is provided on a fiscal year basis, the fiscal year running from July 1 to June 30. Thus, the following table includes date from July 1, 1976, through June 30, 1981.)

Fiscal Year	Billable Hours	Files Opened	Files Closed	Cases Pending	Reports Issued	Cases Settled	Percent Settled
1977	17,880.8	823	772	284	N/A*	N/A	N/A
1978	18,841.5	667	654	297	471	183	28%
1979	15,881.5	782	745	334	520	225	30.2%
1980	18,301.6	670	705	299	473	232	32.9%
1981	18,416.3	616	578	337	327	251	43.4%

*N/A = Not available

From the foregoing it can be seen that the previously discussed legislative changes and increased awareness of settlement procedures had a positive impact. The number of cases referred for hearing was reduced while both the number and percentage of cases settled increased.

From a purely fiscal point of view, the following table, which includes data from fiscal year 1976 (which was for only six months) shows the stabilization which occurred.

Fiscal Year	Authorized Complement	Positions Filled	Income	Expenses	Profit(Loss)	Carry Forward*
1976	35	25.5**	*276,781	341,623	($ 64,842)	$ 16,023
1977	35	21.5	840,067	650,936	189,131	205,154
1978	35	23.5	849,775	775,230	74,545	279,699
1979	35	23.5	844,910	818,411	26,499	306,198
1980	25	23.5	824,324	886,939	(62,615)	243,583
1981	25	24.5	781,206	938,085	(156,880)	86,703

*$80,865 was carried forward from the first half of FY 76.
**Represents positions filled at the close of the fiscal year.

Several things occurred during this five-year span of time. First, the Department of Finance had raised our January 1, 1976, hourly billing rate of $23.00 per hour to $40.00 per hour when the fiscal crisis hit in FY 76. At the same time, we were instructed to maintain that rate until our cash reserves exceeded three months of anticipated expenses. Once that point was reached, the rates were decreased on a temporary basis which was at the start of FY 80. We had also come to feel more comfortable with the caseload statistics and subsequently determined that the three months' cash reserve could be reduced to approximately two months. That reserve actually dropped lower than two months' anticipated expenses as costs increased a little faster than had been projected and we were unable to effectuate a rate increase until the start of FY 82.

Another significant occurrence during this time span was the beginning of a formal training program for our staff. As the law required that only hearing examiners "learned in the law" may conduct contested case hearings,[11] the hearing examiners must maintain licensure as an attorney which means that they must obtain at least 15 credits of continuing legal education each year. Because of the small size of the office and its limited resources, formal training programs within the office were found to be difficult, if not impossible to accomplish due to a lack of educational training expertise, time and cost. After reviewing many available alternatives from a substantive content and cost viewpoint, it was determined that other from outside of Minnesota state government could provide much higher quality training at a lower cost than if we were to try to implement a significant "in-house" program.

Seminars relating to the substantive areas of law directly related to the subject matter of OAH hearings are offered throughout the year by professional legal education associations including the University of Minnesota, William Mitchell College of Law, Hamline University Law School, the Minnesota Bar Association, the National Association of Regulatory Utilities Commissioners, and others. These associations have the ability to gather the leading experts in their respective fields and to provide one, two and three-day structured legal education programs at a nominal cost of approximately $85.00 per day. Given the previously discussed mandate that whenever possible hearing examiners are to be assigned to hearings with expertise in the subject matter of the hearing, these seminars have proven to be the most cost-effective method of both obtaining and maintaining expertise in the various fields of law.

In addition to providing training in specific areas of law, it was also found to be necessary to provide training in the procedural techniques of conducting hearings and writing decisions. By providing training of this type, it was through that we could bring more efficiencies to the administrative hearing process. To find this training, we consulted the Judicial Branch of the state to determine how it trained our state court judges. While our state judges have some minimal training programs within the state, we discovered that they had determined that the best and most cost-effective training programs for judges were conducted by the National Judicial College which has been training judges from all around the country and many foreign counties for more than 20 years. We discovered that the NJC also provides training for administrative hearing officials in a structured, classroom setting. Their courses include training for new judges in how to conduct fair and expeditious hearings, management of complex administrative hearings, decision making and decision writing, advanced evidence, reducing delays, handling of both medical and scientific evidence and only recently alternative methods of dispute resolution. An analysis of the costs of this training versus the benefits to be obtained led us to the utilization of this institution for our office.

The training program of the OAH evolved over the years of operation, the extent of training available each year being dependent on the availability of funds. At present, the training program requires all newly-hired judges to attend the two-week Fair Hearing training course at the NJC. Thereafter, provided that funds are available, all judges are allowed 56 hours of training time and $1,200 of training funds each biennium. Requests for attendance at any specific course is subject to supervisory approval. The benefits of this training program can be seen in the tables included within this report which related to the efficiencies brought to the administrative process in terms of reducing the time for issuing decisions and processing orders and the ability of the judges to handle more cases in less time.

Another program initiated within the OAH during this time span was the start of a working relationship with William Mitchell College of Law. The college wanted to start an administrative law clinical program for its students. The impetus for the clinic came from Professor Melvin B. Goldberg. The college admits up to 10 students per semester into the clinic, the students receiving two credits per semester for their work within the clinic. The students' names are referred to the OAH. They are assigned to at least two hearings per semester. They meet with the ALJ prior to the hearing, attend the hearing, do all necessary legal research, prepare a first draft of the decision, meet again with the ALJ and complete a final draft. The students meet in a classroom setting three times during the semester with Professor Goldberg and at least one representative of the OAH. Because most of these students have full-time jobs and attend classes at night, much of the time spent with the ALJ is before their normal starting time, during their lunch hours or after their normal work day.

The benefits to the students participating in this program are fairly obvious. What is not as obvious are the benefits to the State of Minnesota. The students perform the same function as a law clerk in conducting the legal research and the drafting of decisions. Their work product is usually at a very high level, thus allowing the ALJ to spend less time on a case than would otherwise be necessary. As the ALJ's time spent on a case is billed to the agency for which the hearing is being conducted, the agency benefits from a reduction in the cost of the hearing process. The OAH benefits by the ALJ's being able to handle more cases thus allowing the office to maintain a smaller full-time staff than would otherwise be necessary. As an example of the time saved for the state, during the fall semester of 1985, the students spent a total of 536.4 hours of legal research and decision writing. Assuming that it would take the students twice as long as an experienced ALJ, the total hours saved for the state agencies would be 268.2. At a current billing rate of $68.00 per hour, this amounts to a cost savings to the state agencies of $18,237.60.

During this same time period, a number of bills were passed by the legislature which had varying impacts on the operation of the office. This legislation also impacted on all other agencies where the amendments were made to the APA. These bills and the impacts are discussed below, by year of passage.

1977

1977 Minn. Laws, Ch. 162. This bill amended Minn. Stat. Ch. 105 to make it clear that hearings conducted for the Department of Natural Resources were contested cases under the APA. The department had taken the position that because their statute contained specific hearing procedures, they were somehow exempt from the APA. This bill brought hearings to the OAH which had been anticipated in the 1975 planning but which had never been referred. The bill was the result of a constituent complaint made to Representative Gene Wenstrum following a Ch. 105 water permit hearing which had been conducted by the same person from DNR who had originally denied the permit application.

Minn. Laws 1977, Ch. 323, Secs. 1 and 2. These sections amended the APA to require the Department of Administration to provide one free copy of the State Register to each county library or the library designated by the county board and one copy of the manual of state agency rules to be provided in the same manner. These amendments, which did not contain an appropriation, resulted in an increased cost of publication of both the State Register and the manual of rules. These increased costs were passed along to all state agencies by increasing the charges for publishing rules in both publications. Thus, the bill served to increase costs of rulemaking.

1977 Minn. Laws, Ch. 430, Sec. 7. This bill amended the APA by removing the total exemption from the APA for the Department of Economic Security but maintained its exemption for the unemployment insurance program. The department was thus forced to comply with the APA rulemaking requirements and to refer its non-unemployment contested cases to the OAH. This increased costs for the department in rulemaking but the impact on the OAH was minimal as the number of cases referred to the OAH was quite small and the hearings were all generally very short.

1977 Minn. Laws, Ch. 443. This was the 1977 APA bill. It clarified many sections of the APA which had been adopted in 1975. Section 1 added the Capitol Area Architectural and Planning Board to the definition of "agency" thus bringing them within the APA requirements. Other sections amended the rulemaking sections by clarifying that the APA itself did not grant substantive rulemaking authority to agencies. It also specifically allowed agencies, with the approval of the chief hearing examiner, to incorporate certain materials into their rules by reference rather than repeating the materials in the rules, which was costly. The time for keeping the rulemaking record open for submission of comments following a hearing was increased from five to twenty days. The OAH internal policy of requiring all hearing examiner reports to be issued within 30 days of the close of the record was made mandatory by statute with the proviso that the chief hearing examiner can extend the time for good cause. To further shorten the process, the time for rules becoming effective was shortened from twenty to five days following publication in the State Register. To save costs, agencies were allowed to publish only those parts of the adopted rules which were modified after the first publication. The concept of "emergency" rules was changed to "temporary" rules (a change which subsequently led to problems and the eventual change back to "emergency" rules). Agencies which had adopted or would be adopting rules exempt from the APA were provided a procedure for filing with the Secretary of State. Agencies were given authority to appeal adverse decisions from the district courts to the Minnesota Supreme Court. The chief hearing examiner was given subpoena power which was necessary where hearings were conducted for agencies which did not have subpoena power and to allow the private sector to obtain subpoenas. The emphasis for keeping the record at hearings was changed from court reporters to audio magnetic recording devices. Finally, standing committees of the legislature were directed to study the feasibility or necessity of making the APA applicable to the metropolitan agencies and "encouraged" those agencies to voluntarily contract with the OAH for services. (Only the Metropolitan Waste Control Commission has ever contracted with the OAH.)

1978

There was no significant legislation passed impacting the APA or the OAH, either directly or indirectly.

1979

1979 Minn. Laws, Ch. 332, Art. I., Sec. 8. This amendment to Minn. Stat. § 15.0411, subd. 2, exempted the Public Employment Relations Board (PERB) from the contested case provisions of the APA. PERB serves as an appellate body from decisions of the director of the Bureau of Mediation Services who is also exempt. The purpose of utilizing the OAH for hearings envisions adversarial hearings where evidence is presented. PERB does not conduct evidentiary hearings. The OAH and PERB jointly proposed and supported this amendment.

1979 Minn. Laws, Ch. 336, Sec. 15. This newly added provision of the APA (Minn. Stat. § 15.065) prohibited the departments of Health, Human Services, Economic Security, Corrections and the health related boards from adopting any rule having an annual fiscal impact in excess of $100,000 without first providing the House Appropriations and Senate Finance Committees with a fiscal note. The effect of this amendment, while providing information to the legislature and thus an opportunity for legislative input, has been to increase the cost of adopting certain rules and to increase the time for adoption.

1980

1980 Minn. Laws, Ch. 614, Sec. 70. The Minnesota Personnel Board was abolished. This board determined appeals of state employee disciplinary action when the employees did not use the grievance procedure in the various bargaining agreements. The OAH, which had been conducting the hearings and making recommendations to the board, was given authority for these determinations. As initially adopted, the decisions of the hearing examiners were only recommendations to the agency which had initiated the disciplinary action. Final decisionmaking authority was subsequently given to the OAH (see Minn. Laws 1982, Ch. 560, Secs. 32 and 33).

1980 Minn. Laws, Ch. 615. This was the 1980 revision to the APA. The bill was the result of a task force first formed in 1978 to study the APA. The task force was comprised of a representative from the Office of Senate Counsel, the Office of House Research, the Office of Administrative Hearings, the Office of the Attorney General, and several representatives of state agencies along with an equal number of representatives from the private sector. This task force was initiated by the Senate and House Governmental Operations Committees to review the APA changes since 1975 and to come up with proposed changes. A bill was proposed by the task force in 1979 and passed the House of Representatives in that year. It was held over in the Senate so that additional hearings could be conducted during the summer of 1979 and into the 1980 regular session. The bill finally passed the 1980 Legislature as the second-to-last bill passed for that year. (The only bill passed later than the APA bill was a bill proposing a constitutional amendment to allow initiative and referendum.) The reason that the bill was late in passing had nothing to do with the APA itself but, rather, the bill became a vehicle for other legislation, part of it aimed at deregulation of cable communications and the other at the Metropolitan Council agencies. These latter items were subsequently stripped from the bill in conference committee and the APA bill was passed.

Much of this bill involved clarification of ambiguous language. As an example, there was a question on the extent of the jurisdiction of the LCRAR. This bill clarified that the LCRAR jurisdiction included all rules, not just those adopted pursuant to the APA. The bill further clarified the language relating to the LCRAR suspension of rules. Section 3 of the bill was the result of a survey completed by the LCRAR relating to variances of rules by the agencies. Many agencies felt that they could not grant variances from rules. This amendment specifically allows agencies to grant variances from their rules provided that they first adopt a rule which establishes procedures for persons to apply to the agency for the variance, and adopt standards and criteria by which the variance will be granted.

A significant change in the APA was the introduction, for the first time, of a notice and comment rulemaking procedure for rules which would be noncontroversial in nature. Prior to this bill, every agency adopting rules was required to conduct a public hearing which was then conducted by the OAH. This amendment allowed agencies to proceed to adoption of rules without a hearing with the provision that if seven or more people objected, the agency was required to go to a public hearing. The OAH would not be involved in the rulemaking proceedings unless the hearing was required. The Attorney General's office continued its role in reviewing these rules. The legislation actually used the term "noncontroversial rules". (This phrase was changed in 1984 legislation to be discussed later.)

Another significant change was the introduction of the revisor of statutes into the rulemaking process. Many agencies had complained that they were unable to get assistance in the drafting of rules from the attorney general's office for one reason or another. After determining that there could be conflicts of interest in having assistance given by the attorney general or the OAH, the Senate decided that the revisor of statutes should be allowed to provide the ruledrafting assistance and, in fact, would then be the office which had final authority over the form of the rules. This change was aimed at providing rules with more clarity and uniformity in form and, where agencies actually had no one on staff to draft rules, to assist them in the drafting and thus speed up the process.

Deadlines were imposed on agencies for the adoption of rules following a hearing. Several instances had been brought to the legislature's attention where agencies had proposed rules but had failed to adopt them following receipt of the hearing examiner's report. This legislation required agencies to do two things within certain deadlines. First of all, when agencies were told to adopt rules, they were to initiate the rulemaking process by publishing proposed rules within six months of the effective date of the legislation or to report to the legislature why they had failed to do so. The second deadline was that agencies were required to either adopt rules within six months of the hearing examiner's report or the rules could not be adopted without starting the process over again. Also, they are required to report to the legislature on this failure to adopt rules.

Other miscellaneous changes included the change of the name of the Office of Hearing Examiners to the Office of Administrative Hearings. The bill also clarified the rulemaking authority of the director of the Bureau of Mediation Services to insure that that agency was subject to the APA. In the past, BMS was exempt because their rules had to be approved by the Public Employees Relations Board. The legislature removed the authority of PERB to approve these rules. Another miscellaneous change was to remove the rulemaking exemption for the Department of Economic Security. Finally, the Revisor of Statutes was given authority and responsibility for the publication of Minnesota Rules which was previously with the Department of Administration, State Register.

1981 (Regular Session)

1981 Minn. Laws, Chapter 109. This bill amended Minn. Stat. § 15.0413 to clarify that every rule, including interpretive rules, is required to go through the Administrative Procedure Act. This amendment was in response to a Supreme Court decision[54] which left in doubt the requirements that interpretive rules were required to go through the APA. In order to further clarify the legislative intent, the amendments gave full force and effect of law to all rules, retroactive to their effective date, provided that those rules were adopted under the APA which was in effect at the time of the adoption, that the rules were approved by Attorney General at the time of adoption, and that the agency had statutory authority to adopt the rules. This amendment answered a lot of questions for agencies which had been a direct result of the Supreme Court decision.

1981 Minn. Laws, Chapter 112. This legislation amended Minn. Stat. § 3.965, subds. 3 and 5, relating to the LCRAR. Under prior law, if the LCRAR required an agency to hold a hearing on a rule, the hearing had to be completed within 60 days. This amendment gave the LCRAR discretion to allow the agencies more than 60 days to conduct the requested hearings. This was necessary because, in many instances, it was impossible for the agencies to draft the rules and give proper notice of the hearing within 60 days.

This amendment also clarified the procedures to be followed when a rule is suspended by the LCRAR. The amendments clarify that the suspension was not to take effect until notice of the suspension had been published in the State Register. It also provided that the LCRAR was responsible, as opposed to the agency, for sending the suspension notice to the State Register for publication.

1981 Minn. Laws, Chapter 131. This bill amended various sections of Minnesota statutes. It requires State agencies to provide interpreters for persons with communication handicaps in many instances, including administrative hearings. The bill also detailed specific prohibitions relating to interpreters divulging confidential information. While there is no question that the provision of interpreters is necessary, the providing of interpreters at administrative hearings is an additional cost to State agencies (however, the increase in cost has been minimal).

1981 Minn. Laws, Chapter 253. This legislation was sponsored by the revisor of statutes. It was a result of the revisor, who first became involved in the rulemaking process in 1980, having an opportunity to review the APA and proposing clarification changes. While the bill as originally proposed was solely for clarification purposes, as finally passed there were some substantive changes, as will be discussed below.

Section 1 of the legislation amended Minn. Stat. § 3.965, subd. 2, in an attempt to clarify the jurisdiction of the LCRAR. In fact, the legislation extended the jurisdiction of the LCRAR to all rules, whether they were exempt from the APA or not, as long as they were rules which were filed with the Secretary of State. Under prior law, it was thought that exempt rules were also exempt from the jurisdiction of the LCRAR. The amendment also clarified the procedures to be followed once the LCRAR had suspended a rule.

One important part of this legislation was the result of the revisor of statutes having searched all of the statutes to find specific exemptions from the APA which were "hidden" in various statutes. This bill brought those exemptions within the APA sections and then amended the substantive laws to pull the exemptive language out. In this way, an attempt was made to bring uniformity to exemptions from the APA by ensuring that they were found within the APA. This was an excellent amendment in that persons only have to look to the APA to find out which agencies are exempt from which sections of the APA. Another benefit of the revisor's review was the identification, for the first time, of numerous exemptions to the APA as a whole, or to specific exemptions. With respect to specific program exemptions, in the succeeding publication of Minnesota Statutes, the revisor listed all of these program exemptions in a footnote to the particular sections of the APA. This was the first attempt to identify, for the legislature and the public, the various APA exemptions.

Section 5 of the legislation clarified a problem which had existed. Many agencies believed that they were required to go through the APA requirements to repeal rules even though the underlying statute had been repealed. The agencies were probably correct, given the strict interpretation of the APA. In practice, the agencies simply ignored the rules and did not apply them. However, until they were repealed, they were continuously published in all rule publications. Agencies did not want to go through the time and expense of repealing rules. This amendment took care of that problem by providing that the rules adopted under a statute which is subsequently repealed are also repealed, thus relieving the agencies from the requirement of going through the APA.

Other clarifying language was made in the rule adoption sections including the removal of the word "promulgate" and insertion of the word "adopt". The revisor has attempted to utilize the uniform word "adopt" in subsequent sessions and to remove, wherever possible, the archaic word "promulgate" which is a word that left people wondering whether it meant "propose" or whether it related to the final adoption of a rule.

Section 7 of the bill has proven to be an important section in terms of speeding up the rulemaking process and making it easier for the agencies. This section established a statutory list of material or text which may automatically be incorporated into rules by reference. It also changed the authority for approval of incorporations by reference from the chief hearing examiner to the revisor of statutes but provided that the revisor of statutes could only approve incorporations by reference after consultation with the chief hearing examiner. This allowed agencies to speed up the rulemaking process. When taking rules to the Revisor under the prior language, if the revisor spotted an incorporation by reference, the rules had to be referred to the chief hearing examiner for approval. By having the approval accomplished at the same time and and place as rule drafting, considerable time, and thus expense, has been saved.

Section 15 was the result of problems which had arisen under the temporary rulemaking provisions. Agencies previously were allowed to adopt temporary rules which would be in effect for 90 days and could have them effective for an additional 90 days if they published notice. Agencies were routinely extending the time of the effectiveness at a cost of publication in the State Register and cost of mailing. In fact, it was extremely difficult for agencies to propose temporary rules as well as permanent rules at the same time, complete a rulemaking hearing, and have permanent rules in effect within 180 days. Thus, the statute was changed to allow temporary rules to be in effect for 180 days without having to extend the time. Further, it prohibited an extension without specific statutory authority.

Section 20 was adopted as a response to agencies who were concerned about how they could have their rules published even though their rules were exempt from the APA. This section clarified how these exempt agencies, or agencies whose rules were exempt, are to file rules, which included previously unfiled rules. A deadline was established by which the previously unfiled rules had to be filed in order to have the force and effect of law. This was an aid to the revisor who had been given the authority for compilation of the rules. The revisor had found numerous rules which had been adopted but not filed. This section provided the impetus for getting all adopted rules filed and thus eligible for compilation. Those agencies which failed to file their rules within the deadline would face the problem of their rules being automatically repealed by operation of statute.

A very short section of the bill, and a seemingly innocuous section, specifically applied Minn. Stat. Chapter 645, the Cannons of Statutory Construction, to all rules. Prior to this amendment, while the hearing examiners, most agencies, and most courts looked to Chapter 645 for guidance, there was no specific provision allowing its application when problems in construction of the language of rules arose. This amendment clarified the application of Chapter 645 and the result has been entirely favorable.

1981 Minn. Laws, Chapter 357. Sections 25 and 26 of this bill exempted certain rules from the rulemaking provisions of the APA. The rules exempted were those which set fees. These amendments allowed fee setting by rule but prohibited the public hearing provisions of the APA so long as the total fees to be collected were not to exceed 110% of the sum of all appropriations to the particular agency for the program for which the fees were being collected. It required the commissioner of finance to approve all fees prior to the agency proposing the fees. (These amendments proved to be controversial in subsequent sessions as the initial language was ambiguous. In subsequent sessions, the language was clarified but the basic thrust of these amendments has been maintained.) These amendments resulted in a time saving as well as a savings of expense to those agencies which are required to collect fees but only after establishing the fees by rule.

1981 Minn. Laws, Chapter 346. This was the 1981 workers' compensation legislation. The legislation made a number of significant changes to the Workers' Compensation Law (Minn. Stat. Ch. 176). Of significance to the operation of the OAH was the transfer of the workers' compensation judges from the Department of Labor and Industry (DOLI) to the OAH. This bill had a significant impact on the OAH which will be discussed in the succeeding chapter.

Chapter 7

1981 Workers' Compensation Law Changes, Implementation and Recommendations for the Future

As briefly mentioned in the preceding chapter, Minn. Laws 1981, Chapter 346, amended Minn. Stat. Chapter 176 in many significant ways. Of significance to the OAH was the language transferring the workers' compensation judges (WCJ), all court reporters assigned to the judges, and their support staff from DOLI to the OAH. The bill also provided that the transfer, which was effective July 1, 1981, was to include the removal of the WCJs from the same building that housed DOLI by no later than January 1, 1982. In other words, the OAH was prohibited from having any of the WCJs having an office in the same building as DOLI.[56]

While one of the stated reasons for transferring the WCJs was to move them to an independent agency and thus free them from any actual or even the appearance of any lack of independence in decision making, some within the legislature were fearful that the independence and decision making would somehow be impaired by the transfer to the OAH. Thus, another amendment which was placed in the law was to remove any salary setting authority for the WCJs from the appointing authority, the chief hearing examiner, and to set the salaries of the WCJs at 75% of the district court judges.[57] Additionally, because of a fear that somehow the OAH might assign hearing examiners to workers' compensation cases, the legislation specifically provided that only workers' compensation judges were to hear cases arising under Chapter 176, the Workers' Compensation Law.[58]

In the language transferring the WCJs, discretion was impliedly given to the commissioner of finance to transfer the appropriate funding and necessary support staff. While the language of the legislation was specific as it related to the WCJs and court reporters, no specific numbers of support staff to be transferred, nor positions, were included nor was there any specific amount of funding to be transferred delineated.[59] This proved to be troublesome, as could be expected, when the legislature removes part of a program, including personnel, from one agency and transfers it to another. The administration of DOLI viewed the transfer as a "hostile takeover", having opposed the transfer language quite vigorously during the legislative session. This was a natural reaction which is bound to occur any time the legislature reorganizes government, especially when it involves the transfer of personnel where the transferor agency is opposed.

The problems created by the lack of specificity in the bill were subsequently exacerbated when state revenues began to fall short of projections and several special legislative sessions were called to reduce budgets. Because the funding for workers' compensation was from the general fund, the OAH was subsequently asked to reduce costs, as will be discussed in the next chapter. The reason this created additional problems was because the funding transferred to the OAH, at least according to the documentation put together at the time, was insufficient to cover the cost of operation for the first fiscal year. Secondly, it was the opinion of the OAH at the time of the transfer that insufficient support staff positions were being transferred in order to accomplish the reorganization. At first, DOLI transferred one legal secretary and two vacant positions. After the OAH appealed to the commissioners of finance and administration, three additional positions were to be transferred. However, the OAH requested that three persons be transferred who had expertise in the operation of the workers' compensation section instead of three vacant positions. To do otherwise would have created even more chaos than was created by the transfer itself. Without the transferred expertise, including knowledge of the docketing and filing system within the Workers' Compensation Division at DOLI tremendous delays in the reorganization would have occurred.

Because the legislature required the removal of the WCJs from the same building that housed DOLI, the OAH was required to immediately search for new facilities. DOLI had offices for the WCJs at the Space Center Building in St. Paul. However, it also had a "branch" office in the Summit Bank Building in Minneapolis where it had two attorneys and a hearing reporter serving as a secretary, as well as seven hearing rooms. None of the WCJs were actually officed at the Minneapolis facility. The first thing that had to be accomplished was to determine where the majority of hearings were required to be conducted. A study found that 93% of the workers' compensation hearings requested to be set for hearing within the seven county metropolitan area, were requested to be set within the city of Minneapolis. It was determined that this was a result of several factors. First of all, the vast majority of the injuries were occurring in Hennepin County. Secondly, a much higher number of lawyers practicing in the field of workers' compensation are located in Hennepin County. Finally, the majority of the medical experts used in workers' compensation cases were found within Hennepin County. Based on this study, it was determined that the proper place to move the offices of the WCJs would be to Minneapolis.

Part of the decision to locate the office in Minneapolis was a study of the costs incurred in travel and parking as well as the costs of "down time" of the WCJs. The OAH initially was proposing to have its offices in the midway district of St. Paul, equal distance from the Space Center in St. Paul where two hearing rooms were to be kept, and the Summit Bank Building in Minneapolis. However, once the time and expense study was completed, it was found that by having the judges officing at a facility other than where the hearings were conducted would result in a loss to the State of Minnesota of approximately $167,000 per year. While looking at these cost figures, the OAH also had to look at the costs which might be increased for the conduct of hearings by the APA section and a decision made relative to that section. It was found that 98% of the APA hearings were conducted at a location other than the OAH and thus the specific location of the OAH made no significant difference. Therefore, a decision was made to move the office to the city of Minneapolis, within Hennepin County.

As with the initial organization of the office in 1975, the Real Estate Management Division of the Department of Administration proved to be an invaluable aid in our finding suitable facilities for our offices and hearing rooms. Their expertise in locating available facilities, negotiating with the building owners and real estate agents, and in facilities' design made our task of finding new facilities much easier. In particular, Beverly Kroiss of that agency, who was assigned to work with us, spent many hours assisting in the project. Her personal experience and professionalism were invaluable to the office. She arranged for a review of facilities on a very tight schedule to maximize the use of our time. Just as we were about to make a commitment to locate the offices in a specific facility in downtown Minneapolis, the owners of the Summit Bank Building where DOLI had previously rented a small amount of space, informed Ms. Kroiss that they had additional space available and would like to have us look at their facilities. We immediately reviewed their submission and subsequently viewed the property. Given the location of the facility (one-and-one-half blocks from the Hennepin County Government Center), its accessibility to the skyway system, its convenience in terms of mass transit, immediately adjacent parking facilities, and the proposed square-footage rate, a decision was made to locate our offices and 13 hearing rooms on two floors of that facility. At the same time, a decision was made to maintain an office in the city of Duluth with one WCJ and one support staff person and at the same time to have two hearing rooms located in the Space Center in St. Paul where the Department of Labor and Industry is located. The Minneapolis facilities were designed with the help of Ms. Kroiss and architects from the Summit Bank, the offices were constructed and the move was completed during the month of December 1981.

At the same time that we were attempting to find adequate facilities for the office, we began a study of the system for adjudication of contested workers' compensation cases. During the course of the 1981 Legislative Session, we had been present during the discussions by the legislative committees and had some idea of the problems which they sought to solve by transferring the WCJs to the OAH. One of the most often-heard complaints, following second only after high insurance premiums and the number of cases resulting in litigation, was the length of time it took to process a case once the litigation had begun. The "benchmark" which everyone looked to when discussing delay was the length of time between the date of the filing of a claim petition to the date of the hearing. The date of filing was considered to be the date on which the claim petition was accepted for filing by DOLI and the date on which the petition was then served on the employer and insurer by DOLI, which was a requirement of the statute at that time. We found that no one was using the date on which a judge's final order was issued as the date on which the case was concluded. Another problem cited by many was the delay in the processing of appeals to the Workers' Compensation Court of Appeals (WCCA). (It should be noted that the delay discussed in regard to the WCCA was not in the processing of the case once at the WCCA but in getting the case to the WCCA.) Another complaint often heard was the delay caused by the loss or "misplacement" of correspondence sent to judges. Finally, it was stated that their was no incentive for parties to resolve their differences by settlement of the issues because of substantial delays in the approval of the settlement and the issuance of an award by a compensation judge. These problems, actions taken to resolve them, and the results are discussed below.

A. Filing and Service of Claim Petitions. While the 1981 legislation was still pending, the then-deputy commissioner of DOLI, R. B. Swanson, and the chief hearing examiner began a study of the existing system whereby claim petitions were served by the department. It was estimated that it required a minimum of one person to process these petitions, at a total estimated cost, including postage, of $35,000 annually. Additionally, parties had complained that substantial delays were occurring by the failure to promptly process the petitions or by rejection of the petitions for various real or perceived defects. As a result of the study, amendments were proposed while the 1981 legislation was still pending, which amendments were included in the legislation. These amendments require petitioners to serve the claims themselves prior to filing with DOLI rather than having DOLI file the petitions.[60] While it is obvious that this amendment corrected a problem, the extent to which it has actually reduced delay cannot be ascertained because no records had been maintained prior to the passage of the 1981 legislation.

B. Conclusions of the Hearing Process. In response to previous complaints that it had been taking too long for a case to be heard once filed, the then-commissioner of DOLI, Harry Peterson, had initiated two new procedures at DOLI. First, he established one of the compensation judges as a settlement judge. Second, he increased the number of cases set for hearing each day. While these steps did result in a reduction in the length of time between the filing of the petition and the initial date scheduled for hearing, in fact, the process was further delayed for many cases. In order to see how this occurred, one must first have an understanding of the prior system.

Prior to the Peterson-initiated changes, a calendar judge conducted scheduling conferences, either in person or by telephone. A hearing date was established at this conference based on the time available for the parties and the length of time the parties indicated they would require to complete the presentation of their evidence. If the case subsequently settled, the compensation judge would have that date available for decision writing. The judge would also be required to review the settlement when the stipulation was received, and issue an award if the judge found the settlement to be reasonable, fair and in accordance with the Workers' Compensation Law. There were no support staff positions assigned to assist the judges in the preparation of their decisions. None of the judges had dictation equipment assigned to them. Only three telephones were available for the 16 trial judges. Therefore, on Mondays when no hearings were scheduled, the judges would have a court reporter assigned to them for the purpose of dictating orders and awards. The reporters would then prepare the orders or awards when they were not in hearings. Orders were sometimes delayed in typing for three to four or more weeks.

Commissioner Peterson determined that parties would be more apt to settle a case sooner if forced to get together before an impartial person solely for the purpose of discussing settlement. He was correct in his thinking as the statistics provided from DOLI have shown. However, for every case settled in this manner, it meant that there would be one less case settled after being set for hearing, which left one less day available for a judge to work on preparing decisions. This resulted in delays in the preparation and issuance of the orders and awards.

Another change initiated by Commissioner Peterson was to increase the number of cases set for hearing each day. Cases not initially assigned to judges when set for hearing are referred to a "back-up" cases. Thus, when a case which had been assigned to a judge was settled, the judge would then be assigned to hear one of the back-up cases. Obviously, this further reduced the time a judge had available to prepare and issue decisions. Finally, in the same category, cases wherein the parties indicated that they would need more than one day of hearing were set for one day only. This allowed more cases to be initially set for hearing in a shorter time but required the parties to either obtain an additional later date to complete the case or to incur the cost of taking depositions of those persons who did not present their testimony at the hearing. In the latter instance, the judge would lose the benefit of personally seeing the witnesses, which is sometimes necessary when judging the credibility of these witnesses. Further, the judge would have to read the testimony when the depositions were received at a later date, plus review all other testimony once again because it would be "stale" by the time the judge had sufficient time to begin work on the decision. The delays caused are obvious.

When the 1981 transfer became effective, the transferred judges were asked to prepare a list of all cases which they had heard but which were still waiting for a decision. It was found that on the average there were 15 cases pending per judge. Some had been pending for nearly 24 months, many for more than one year. All of the judges were concerned about this backlog, which they indicated was a direct result of the settlement judge process, the increased number of back-up cases being set, and the "calendar crunching" or setting of cases for hearing for less time that really was necessary to conclude the testimony.

Immediate steps taken to relieve the back-up situation were the reduction of the number of back-up cases set for hearing and removing one or two judges at a time from the responsibility of hearing cases so that they could concentrate on issuing their backlog of decisions. By the end of March 1982, all but two of the transferred judges were virtually current in the issuance of decisions. One of those two judges retired, leaving his cases for other judges to decide, and the other judge was current by the end of June of 1982.

As a part of the reorganization, further steps were taken once the move of the judges was accomplished. Dictation equipment was purchased for all judges. Secretarial support staff utilizing word processing equipment were hired to fill the transferred vacant positions. The secretarial support staff were assigned to specific judges. Court reporters were no longer assigned to the preparation of judges' orders except in emergency situations. As DOLI had received authority in 1981 to increase its settlement judges to three, it was assumed that they would settle nearly three times as many cases as before. (Eventually, DOLI increased the number of settlement judges to five.) The assumptions that more cases would be settled before they were transferred to the OAH has proven to be correct although the settlements did not triple. As a result of this assumption, we reduced the number of back-up cases so that at the present time we set only one back-up case each day for every two-and-one-half judges available for hearing (not on leave or assigned to road trips). Cases were also set for sufficient time to complete all testimony at the hearing. A rule was adopted requiring that in the case of any witness who did not intend to appear at the hearing, their deposition was to be taken prior to the hearing so that the case could be totally submitted to the judge at the time set for hearing. A performance standard was established for the judges which requires all decisions to be issued within 60 days after a case was fully submitted for decision. This performance standard was subsequently adopted into law with the further requirement that in the event a judge failed to issue a decision within 60 days, they would lose their pay while any cases were waiting to be issued within the time period.[61] Judges were also required to submit a "Case Record Report" at the end of each month wherein the status of all cases pending before the judge is detailed. Finally, statistics on each judge and on the office as a whole are maintained and published within the office each month.

In addition to the adoption of procedural rules for the conduct of hearings and internal policies and procedures which accompanied the reorganization, the OAH sought a number of legislative changes to the Workers' Compensation Law during the 1981 Special Legislative Sessions, the 1982 regular session, and the 1983 regular session. The specifics of these legislative changes will be discussed in a later chapter. The changes requested by the OAH were aimed at reducing delays in the system. However, while the OAH was seeking procedural changes to the law, the legislature continued to make substantive changes in the Workers' Compensation Law, not the least of which have been major amendments to the law during the 1983 Legislative Session.[62] The substantive changes in the law had an immediate positive impact by the reduction of cases certified to the OAH for hearing. However, for a variety of reasons, not the least of which is uncertainty over the interpretation of many sections of the new law, there has now been an increase in the number of claim petitions filed. Because the hearings include many new and complex issues, more expert testimony is required which has the result of requiring more hearing time. Thus, while the OAH had been continuing to work toward reductions in delay, within the past 12 months the trend is slowly reversing as the number of cases filed and the length of the hearings conducted increase.

As a result of the changes discussed above, the following have occurred:

1. Length of Hearings. In April of 1980, 84% of the cases were scheduled for one day or less. This compares to November of 1985 where only 51.7% of the cases are set for one day or less. The following chart on case settings gives a more graphic picture of the change in the length of hearings.

Case Settings

	April 1980	March 1983	Nov. 1984	March 1985	Sept. 1985	Oct. 1985	Nov. 1985
1 Day or Less	84%	68.2%	67.5%	69.6%	63.0%	59.5%	51.7%
1-1/2 Days	9%	14.6%	16.8%	21.8%	23.5%	25.7%	35.5%
2 Days or More	7%	17.2%	8.2%	8.6%	13.5%	14.8%	12.8%

2. Time to Issue Decisions. In December of 1981, the average length of time for decisions to be issued was 101 days following the close of the hearing record. By July of 1982, this had been reduced to an average of 45.6 days. By June 30, 1985, at the conclusions of FY 85, the average time to issue final decisions during FY 85 was 31 days, 52% of the decisions being issued in 30 days of less. For the first six months of FY 86, the time has been further reduced to an average of 27 days.

3. Conclusion of the Hearing Process. Apparently prior to 1981, no records other than the time from the acceptance of a petition for filing to the initial date of hearing were maintained. DOLI had been reducing the length of time from the filing of a petition to hearing prior to the transfer. However, they were not maintaining records on the length of time for the issuance of decisions which, as can be seen from above, was an average of 101 days. Using data from claim petitions filed in December of 1982, it took 13 months to get a hearing date and an additional 66 days for a decision to be rendered. At the present time, after having previously reduced the time between the filing of a claim petition and the first hearing date to ten months, it now takes eleven months to the first available hearing date but the time for issuance of decisions is 27 days. Thus, the total time for disposition of a case is approximately 12-and-one-half months. This is down from 15-1/2 months during the FY 83 time period.

4. Backlog of Pending Decisions. As stated previously, the backlog of pending decisions (cases wherein the hearing had been conducted but no decision having been issued) was an average of 15 cases per judge on July 1, 1981. As of December 31, 1985, the average backlog was 7.2 cases per judge. Of the 136 cases pending as of December 31, 1985, 74 were cases which had been heard but wherein the record was still open awaiting additional evidence. This represents 54.4% of the pending cases.

C. Processing of Appeals. Prior to July 1, 1981, court reporters employed or under contract to DOLI were present at all hearings to keep a record of the proceedings. The employee court reporters were also responsible for typing judges' orders. The employee court reporters had been allowed to keep all income derived from the sale of transcripts of hearings with which they had been involved. While they were told that the transcripts were to be prepared on their own time since they received the proceeds, many of the transcripts were prepared during normal working hours. Because of their additional duties, delivery of transcripts took considerable time, in some instances more than one year to complete. Appeals from compensation judge decisions are not sent to the WCCA until the transcripts are completed.

Effective July 1, 1981, a 21-day deadline for the delivery of transcripts was imposed. Additionally, all proceeds from the sale of transcripts were required to be paid to the office revolving fund. The court reporters initiated a lawsuit over the imposition of the foregoing which resulted in a delay in implementation of the new procedures until the lawsuit was resolved by settlement in September of 1981. In addition to the new procedures, the office began tape recording many workers' compensation cases, thus allowing court reporters more time to prepare transcripts. At the same time, more contracts were entered into with court reporters from the private sector so that when the employee court reporters were required to prepare a transcript of a hearing, they could spend all of their time preparing the transcript in order to meet the 21-day deadline.

During the 1981 Third Special Session, one of the the "budget cutting" sessions, the legislature required that the OAH discontinue the use of court reporters who were state employees as soon as existing labor agreements permitted.[63] Because of the settlement of the 1981 lawsuit, this could not occur until September 30 of 1982. In the same session, the legislature mandated the use of audio magnetic recording devices to keep the record in all two-party cases but did allow parties to bring in their own court reporters at their own expense so long as the reporters were from a list approved by the chief hearing examiner. It also, by implication, mandated that the OAH utilize court reporters for multi-party cases.[64] Prior to September 30, 1982, the office began preparation for the layoff and expanded the contracts with the private sector for both court reporting services and for the transcription of the tapes of those hearings wherein an audio magnetic recording device had been utilized. Once the layoff had occurred and all severance and unemployment compensation payments had been made, the office was able to calculate the total savings to the state as a result of the layoff. When taking into consideration the salaries of the court reporters at the time of the layoff, inflated for normal cost of living increases which have occurred for all state employees since that time, and deducting the present costs of maintaining the record at the hearings, it is estimated that this provision has resulted in a cost savings of approximately $450,000 during fiscal year 1985.

At the present time, the office has contracts with court reporters in the private sector to provide both the court reporting and transcription services. These contracts require that transcripts be furnished within 21 days. In fact, several of the transcription services are now providing the transcripts in less than seven days. Thus, the delay in the processing of appeals has been greatly reduced. No comment can be made in this report on the time of completing an appeal once it is sent to the WCCA as the OAH keeps no records on that issue. However, it must be assumed that a large part of the reason for previously heard complaints arose from the delay in getting the cases to the WCCA.

D. Delivery of Correspondence. For whatever reason, mail sent to compensation judges was not reaching the judges. When mail was received at DOLI, if the file could not be found, the mail was placed in a box for later review. At times, this mail never reached the files or the judges. As a result, it had become common practice for lawyers to send mail to the judges marked "personal and confidential" or to actually send the mail to the judges' homes. The defects in such a system are obvious. Additionally, it was discovered that lawyers routinely copied the judges on all correspondence between themselves and the insurance companies and routinely filed everything with the judges, even though there was no law nor rule requiring such filing.

Changes were made effective January 1, 1982, when the move into separate offices was concluded, including notification to all attorneys that mail was no longer to be sent "personal and confidential" and that no mail was to be sent to judges at their homes. Additionally, in order to reduce the volume of mail and thus reduce the size of the file requirements, all attorneys were notified that their "junk" mail was not to be sent to the judges and that only those matters required to be filed by law, rule or order of the judge were to be filed.

These changes have dramatically reduced the volume of mail and thus has assisted in speeding up the delivery of the mail to the judges. Further, the office established a priority system whereby most mail is delivered to the judge by staff, allowing the judge the opportunity to determine whether the correspondence is necessary for filing, should be discarded, or that the file is needed. Mail is delivered to the judges in this fashion within 24 hours of its receipt, most on the day that it is received. Priorities by subject matter have also been established for all items received in order that the mail will be handled as expeditiously as possible. One very important aspect of the mail handling procedures involves Stipulations for Settlement, which will be discussed below.

E. Settlements. The Workers' Compensation Law has long recognized that cases do not always require a full hearing and that parties may desire to resolve their differences through a settlement process. Minn. Stat. § 176.521 has provided the statutory framework for such settlements since 1953. However, due to a variety of reasons, not the least of which has been the Worker' Compensation Law as a whole and the procedures required to be followed in settlements, the percentage of contested matters settled in workers' compensation has been, and continues to be, considerably less than found in civil cases in the district courts. In the court system, 95% to 98% of all cases are settled without a hearing. It was found that in FY 81, only 63.1% of the total contested workers' compensation matters were resolved through settlement.

One of the reasons most commonly expressed for the low percentage of settlements had been the delay in obtaining the approval of a compensation judge and the uncertainty of the settlement being approved. Prior to February of 1982, if a settlement was agreed upon by all parties, a Stipulation for Settlement was prepared, signed by all parties, and submitted to the commissioner or a compensation judge for approval. The standard for approval was that the terms of the settlement must be "reasonable, fair and in conformity with" Chapter 176. No rules have ever been adopted to define what is reasonable or fair, thus leaving discretion in the compensation judges. In fact, what was reasonable and fair to the parties and some judges would not be considered reasonable and fair by other judges. Some judges had applied standards which they termed "unwritten rules" or "long-standing policies" when reviewing cases submitted for settlement approval. One judge expressed an opinion of the role of a compensation judge in this regard as being "responsible for protecting injured employees from their own folly". This issue was addressed in the 1981 Third Extra Session of the legislature. Prior to that time, Minn. Stat. § 176.521 provided that if all parties were represented by attorneys, the submitted settlement was "presumed" to be reasonable, fair and in accordance with the Workers' Compensation Law. That section was amended to provide that where all parties to a case are represented by attorneys, the settlement is conclusively presumed to be reasonable, fair and in conformity with the Workers' Compensation Law."[85] This provision was limited in 1983 by providing that the "conclusive presumption" only applied where the settlement did not purport to be a full, final and complete settlement of an employee's right to medical compensation or rehabilitation under Chapter 176."[86] At the same time as these amendments were being made, top priority was being given to settlements received in the office, both in mail distribution and in the establishment of a performance standard for the judges. The performance standard is that all awards are to be issued within ten calendar days of receipt of the Stipulation in the office. The results of these changes are as follows:

1. Length of Time to Issue Awards. Immediately following the transfer in 1981, it was determined that the average length of time to issue an Award on Stipulation was 51 days. By January of 1982, Awards on Stipulation were issued in an average of 43.47 days. By December of 1982, following the effectiveness of the "conclusive presumption", the average time had been reduced to six days. By March of 1983, the average time to issue Awards on Stipulations had been reduced to four calendar days. Since that time, even following the limitations imposed during the 1983 Session, the average time to issue these awards has consistently remained four calendar days for FY 84, FY 85 and for the first six months of FY 86. During December of 1982, 86% of the Awards on Stipulation were issued in less than ten days. By July of 1982, 57.6% of the awards were being issued in ten days or less. This number was then increased to 84% for the entire 1983 fiscal year, 93% for FY 84 and 96% for FY 85.

2. Number of Settlements. The increases in the number of cases settled can be seen in the chart below. In reviewing the chart, it should be remembered that the amendment to the law was effective starting in February of FY 82.

Awards on Stipulation

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
July	215	171	358	361	450	418
August	188	290	393	459	417	451
September	163	288	341	406	324	367
October	174	325	371	363	429	528
November	179	198	372	295	375	377
December	291	308	412	400	390	387
January	232	249	407	432	429	
February	298	388	427	364	442	
March	273	450	510	374	313	
April	230	386	367	340	452	
May	308	400	426	468	492	
June	287	396	459	487	336	
Total	2838	3849	4843	4749	4849	

3. Percentage of Settlements. As previously stated, during FY 81, 63.1% of the total dispositions were by settlement. For FY 85, 78.9% of the total dispositions were the result of settlements. This figure is still well below those of the district courts in civil cases.

F. Other Matters. The OAH discovered many other areas of the Workers' Compensation Law wherein ambiguities in the law were resulting in litigation. It worked with DOLI in finding these ambiguities and coming up with language to amend the statutes to remove the ambiguities. Additionally, many other areas of the Workers' Compensation Law were reviewed by OAH and DOLI resulting in various amendments to the Workers' Compensation Law. While DOLI has been more concerned over the substantive provisions of the law, the OAH has attempted to keep its review to the procedural aspects of the law. At the present time, there is continued concern over delays in the workers' compensation system. As stated above, while the delays were being reduced, albeit slowly, changes made by the legislature in 1983 have resulted in an increase in the number of claim petitions being filed, and an increase in the length of time to hear cases. While the 1983 changes were an attempt to reduce "litigation", until such time as the WCCA and the Minnesota Supreme Court have had an opportunity to interpret the 1983 law changes, it is anticipated that there will continue to be an increased number of claim petitions filed. Additionally, further changes were made to Chapter 176 in both 1984 and 1985. It is anticipated that additional changes to the Workers' Compensation Law will be made by the 1986 Legislature. Each time the legislature makes changes in the law, it will result in uncertainty in the interpretation of the laws which leads to an increase in litigation. Litigation, for the purpose of this report, is defined as any administrative proceeding wherein the legal rights, duties or privileges of specific parties are required by law or constitutional right to be determined. Thus, when one includes the administrative conferences conducted at DOLI with the increase in the number of claim petitions filed and the slowly increasing number of objections to discontinuances or petitions for discontinuance filed, litigation has increased dramatically. The following charts show, by fiscal year, the number of claim petitions filed each month during the fiscal year, the number of petitions for or objections to discontinuances filed (which are referred to the OAH) and the number of notice of intention to discontinue ((NOID) received at DOLI and the number of discontinuance conferences held at DOLI since the implementation of the 1983 changes.

Claim Petitions

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
July	384	266	393	379	406	451
August	358	412	419	404	405	420
September	372	400	387	392	309	398
October	378	392	400	412	409	459
November	377	345	398	371	378	404
December	419	405	408	401	351	427
January	383	343	438	382	379	
February	386	325	414	395	402	
March	403	409	462	456	389	
April	397	400	402	408	433	
May	369	346	360	407	441	
June	401	385	377	401	378	
Total	4627	4428	4858	4808	4680	

Discontinuances

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
July	101	106	78	73	27	60
August	78	104	74	61	43	57
September	64	80	109	46	20	56
October	78	65	102	37	58	55
November	59	55	86	49	39	38
December	83	73	87	38	54	43
January	95	85	90	50	48	
February	90	95	77	52	41	
March	82	87	101	33	48	
April	75	83	72	33	43	
May	71	80	86	49	49	
June	115	74	67	46	49	
Total	991	987	1029	566	519	

		NOIDs Received	Discontinuance Conferences Held
December	1983	214	96
January	1984	186	100
February	1984	247	107
March	1984	240	131
April	1984	251	109
May	1984	218	99
June	1984	305	97
July	1984	337	115
August	1984	331	117
September	1984	339	100
October	1984	371	148
November	1984	375	141
December	1984	347	87
January	1985	363	120
February	1985	415	107
March	1985	493	124
April	1985	425	124
May	1985	464	161
June	1985	399	146
Total		6320	2229

Another fact we must review in determining the overall disposition level of workers' compensation cases is the number of decisions issued by the compensation judges. If there is, as stated previously, an increase in the length of time to hear a case, fewer cases can be heard each month. The following chart can be used to verify that previous assumption.

Workers' Compensation Judge Decisions

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
July	97	50	62	89	59	65
August	86	80	74	92	78	74
September	70	89	59	77	67	60
October	94	99	59	72	76	60
November	80	65	78	73	75	62
December	93	69	78	78	70	71
January	80	77	93	68	86	
February	90	67	70	64	68	
March	99	115	94	65	68	
April	86	72	74	69	79	
May	95	58	92	81	73	
June	98	88	91	63	72	
Total	1068	929	924	891	871	

Even though there appears to have been a recent trend of an increase in filings, it is too early to determine FY 86 statistics. The following chart shows a five-year statistical comparison to show the number of contested matters filed for hearing which are referred to the OAH versus the number of dispositions. When looking at dispositions, it should be remembered that dismissals and awards on stipulation include those issued by DOLI. In short, this is a "system-wide" chart. It shows that in FY 81 there were 1,448 more cases filed than were disposed of versus FY 85 where there were 807 more cases disposed of than had been filed. Given the first half of FY 86 statistics, we are anticipating that even though there will be an increased number of cases filed for hearing, there will still be more cases disposed of than are filed.

Minnesota Workers' Compensation
Five-Year Statistical Comparison

	FY 81	FY 82	FY 83	FY 84	FY 85
Claim Petitions	4627	4428	4858	4808	4680
Objections to Discontinuance	942	959	1020	463	425
Petition for Reimbursement	56	117	144	111	137
Retraining/Rehabilitation	225	137	105	160	N/A
Change of M.D.	38	54	64	15	N/A
Petitions to Discontinue	49	28	9	103	94
TOTAL	5937	5723	6200	5660	5336
Dismissals	456	488	527	523	423
Findings	1068	929	924	912	871
Awards on Stipulation	2838	3849	4843	4749	4849
Others	127	148	35	0	0
TOTAL	4498	5414	6329	6184	6143
Difference	(-1448)	(-309)	+129	+524	+807

In order to more efficiently process the caseload, the OAH has set goals and established programs to increase both efficiency and productivity. Use of a computer to keep track of cases, issue pretrial orders and hearing notices and to actually assign and set cases for hearing allows our support staff to handle more work with fewer mistakes or oversights. It also will allow us to schedule our judges more fully and, additionally, will give us the availability of at least half the time of our calendar judge to hear cases.

The OAH has now implemented monthly staff meetings for all WCJs to discuss case law developments and any problems or issues which may be common to all of them. This allows the OAH to have some degree of uniformity in its approach to common problems or issues. It is believed that these monthly meetings have achieved greater communication among the judges and greater productivity. Additionally, the training program discussed in a previous chapter has proven to be most effective as we discovered that prior to the transfer to the OAH, none of the WCJs had ever been allowed time off to attend training programs nor given any specific training in the conduct of hearings or the writing of decisions. We have seen a noticeable difference and improvement in the quality of both the conduct of hearings and the issuance of written decisions since implementing the training program.

G. A look to the future. At the time of the preparation of this report, the 1986 Legislative Session had not yet commenced. However, from conversations with the commissioner of DOLI, several Senators and Representatives, and others actively involved in the field of workers' compensation, it is anticipated that the legislature will make additional changes to the law. However, it is questionable whether the legislature can make any changes to the substantive structure of the benefits portions of the law because apparently no accurate data exists to determine whether the changes made in 1983 will have any impact on the reduction of workers' compensation insurance rates to Minnesota employers. Testimony at legislative hearings held during 1985 and January of 1986 have indicated that over the past year or so, Minnesota employers have received an average of 35% to 45% increase in workers' compensation insurance premiums and in some instances increases of more than 100%.

Thus, it has become apparent that changes are necessary. Where those changes will occur remains to be seen. However, one area which continues to be a problem is the delay in the disposition of contested workers' compensation claims. Several proposals have been put forth. It is believed that the OAH has done everything it can do by rule or internal policy to reduce delay and thus any further reductions in delay must be the result of legislative changes. Absent such changes, the only way to have an immediate impact on the delay in the system is to hire more compensation judges. While this will resolve the problems on a short-term basis, additional changes in the law must be made if the delays are to be prevented, on a long-term basis. Proposals for amendments to existing law which would assist in delay reduction could include the following;

1. The notice required by Minn. Stat. § 176.271 be amended to mandate that the notice must include all medical reports not previously submitted to the employer and that the notice and the reports be sufficient to establish the claim.

2. Amend Minn. Stat. § 176.305 by removing the settlement judge provisions, requiring the claim petitions to be referred to the OAH within ten days following their filing, allowing DOLI to reject any claim petitions which are incomplete or which fail to include all necessary documentation.

3. Amend Minn. Stat. § 176.306 to require all hearings to be held within six months of the filing of a claim petition, continuances to be granted only upon a showing of good cause and to be granted only by the chief ALJ or designee. The same section might include a requirement that not only attorneys but their clients must sign all requests for a continuance.

4. Minn. Stat. § 176.312 be amended to differentiate between a petition for removal or automatic reassignment of a judge and an affidavit of prejudice for cause.

5. Any case referred to the OAH wherein an answer has not been filed nor an extension (of not more than 30 days) granted by the commissioner or agreed upon, in writing, by the petitioner, shall be set for hearing at the first available date on the OAH calendar.

6. Amend Minn. Stat. § 176.341 to require all cases to be heard within six months of the filing of the claim petition, including the provision that no continuance may be granted which would not allow the case to be heard within the six months, giving discretion to the chief ALJ to schedule settlement or prehearing conferences as may be appropriate.

7. Add a provision mandating that all evidence must be presented at the hearing and that only in cases of surprise or other exceptional cause will any evidence not submitted at the hearing be considered. This should include all evidence relating to taxable costs and attorney fees.

8. Amend Minn. Stat. § 176.411 to require that all depositions and other discovery must be completed within 90 days of the filing of a claim petition.

9. Require all adverse medical examinations to be completed within 45 days of the filing of the claim petition and the report of the exam to be served and filed 15 days thereafter.

10. Amend Minn. Stat. § 176.155, subd. 5, to allow full testimony of a health care provider only with the approval of the chief ALJ or designee. Delete the provisions allowing full testimony after the hearing except in cases of surprise or other statutorily-stated good cause.

Chapter 8

1982-1985

As can be seen from the preceding chapter discussing the changes involving workers' compensation, legislation passed by the 1981 regular session of the Minnesota Legislature brought major changes to the OAH. While in the process of the reorganization, the state of Minnesota, as was the case with the rest of the states in the nation, faced an economic recession. This resulted in numerous special legislative sessions wherein many changes were made in an effort to reduce the overall costs of the operation of state government.

At the start of FY 82 on July 1, 1981, the office had reorganized itself as is shown on the organizational structure at the end of this chapter.

As can be seen from that structure, upon transfer of the workers' compensation cases to the OAH, the chief hearing examiner personally supervised all of the WCJs. The responsibility for supervision of the court reporters in the workers' compensation section was the responsibility of the docket administrator for workers' compensation, while the supervision of the court reporters for the APA section of the office remained the responsibility of the administrative assistant. When the legislature met to consider reductions in the cost of operation of government, as discussed in the preceding chapter, the office was faced with the problem of reducing expenditures in workers' compensation where the funding for the office came from the state general fund. As a result, several vacant support staff positions remained unfilled and all court reporters were laid off. While it was initially thought that the APA section would be effectively immune from any budget reductions, we saw an impact due to reductions in the budgets of other agencies. As the budgets of the other state agencies were reduced, these agencies began to find other ways of resolving disputes which otherwise would have led to administrative hearings. This resulted in a reduction in the requests for services of the OAH.

At the same time as the results of the budget reductions were being felt, the office was also seeing the results of the 1980 amendments to the APA which allowed agencies to adopt rules without the necessity of a public hearing unless seven or more people objected to the rules and requested a hearing. While rulemaking had never comprised more than 20% of the total number of hearings conducted by the office, because of their complexity the billable hours produced by those hearings were higher, on the average, than contested cases. The following chart, beginning with FY 78, shows the impact of the implementation of the "noncontroversial rulemaking" provisions.

Rulemaking Hearings as a Percentage of Total Reports Issued

Fiscal Year	Total Reports Issued	Rulemaking Reports Issued	Percentage of Reports Which Involved Rulemaking
78	471	92	19.53%
79	520	71	13.65%
80	473	69	14.59%
81	327	32	9.79%
82	345	24	6.96%
83	391	18	4.6%
84	352	13	3.7%
85	331	21	6.3%

While the requests for OAH services for rulemaking hearings was diminishing, agencies also began their own cost-saving techniques which resulted in a decrease in requests for services following the 1982 legislative sessions. At the same time, as discussed in prior chapters, the office was implementing new settlement techniques, increasing the training and thus efficiency of its staff, and utilizing law students from the William Mitchell College of Law. The following table, which is a continuation of the table produced at the beginning of Chapter 6, gives a picture of the office's operation from July 1, 1981, through June 30, 1985.

Fiscal Year	Billable Hours	Files Opened	Files Closed	Cases Pending	Reports Issued	Cases Settled	Percent Settled
1982	20,210.0	542	557	322	345	212	38.1%
1983	15,637.2	625	633	314	403	230	36.3%
1984	13,462.5	557	604	267	353	251	41.6%
1985	12,090.2	651	620	298	331	289	46.6%

As can be seen from the foregoing table, while the number of files opened remained fairly constant, the number of billable hours was reduced dramatically. This is a direct result of our efforts at settling cases which continued to increase to 46.6%, efficiencies within the office, increased utilization of law students from William Mitchell College of Law, and several other new types of cases referred to the office which required considerably less time to complete. With respect to the latter comment, the Department of Revenue began submitting cases under the state's Revenue Recapture Act passed in 1980 and discussed in Chapter 6. Additionally, the office began to receive more cases from political subdivisions of the state, especially from Special School District No. 1 (the City of Minneapolis school district), the City of Minneapolis Civil Service Commission, and the Hennepin County Personnel Board. Many of these cases involved very little time yet accounted for a large number of the files opened and closed each year.

From a purely fiscal point of view, the following table, similar to that in Chapter 6, shows the financial status of the office for fiscal years 1982 through 1985.

Fiscal Year	Authorized Complement	Positions Filled	Income	Expenses	Profit (Loss)	Carry Forward
1982	25.5	21.25	1,253,410	1,163,077	90,333	177,036
1983	25.5	20.5	939,357	1,013,037	(73,680)	103,356
1984	20.5	15.5	824,105	864,916	(40,811)	62,545
1985	20.5	15.5	855,167	832,492	22,675	85,220

In reviewing the two tables above, it must be remembered that at the beginning of FY 82 workers' compensation was transferred to the office. As part of the reorganization, several of the positions from the APA section were split between the workers' compensation section and the APA section. As an example, one-half of the position and thus one-half of the costs of the chief hearing examiner and the administrative assistant are split between the two funds. This helps in accounting for the reduction in the total number of positions filled and thus the reduction in expenditures. Besides the splitting of several positions between the two funds, the APA section further reduced its staff of hearing examiners during this period by three, bringing the total number of hearing examiners at the end of FY 85 to nine. Thus, over the ten years of operation, the OAH reduced its staff of hearing examiners by five-and-one-half positions (37.9%) while the total number of cases received from FY 77 to FY 85 was reduced from 823 to 651, a reduction of 172 cases or 20.1%. From FY 79 where a high of 520 hearing examiner reports were issued there has been a reduction in the number of reports issued of 189 or 36.3%.

As indicated in a prior chapter, at the inception of the office an internal policy was established whereby all reports were to be issued within 30 days of the close of the hearing record unless an extension of time was granted for good cause. Statistics on this issue were first kept beginning with FY 78. During that fiscal year, 85.1% of the reports were issued within 30 days of the close of the record. For FY 85, 93.7% of the 310 reports issued were issued within 30 days of the close of the hearing record. Office-wide, the average length of time for the issuance of a report from the close of the hearing record was 14.5 days. (FY 85 was the first year wherein office-wide statistics on the length of time to issue decisions was kept.)

During this last four years, legislation directly impacting the OAH was passed. Other legislation having indirect impact on the OAH was also passed by the legislature, not the least of which were the budget-cutting provisions of the special and regular sessions of 1982. At the same time, the legislature continued to amend the APA as well as continued to grant further exemptions from the APA requirements. The following is a review of the legislation passed during this four-year period.

1982

1982 Minn. Laws, Chapter 424, § 130. This section of the law gave specific authority for the revisor of statutes to recompile (recodify) the APA if the revisor deemed it appropriate. Following this authority, the revisor recodified the APA from Chapter 15 to Chapter 14 of the Minnesota Statutes.

1982 Minn. Laws, Chapter 512, §§ 4 and 6. Section 4 of this bill amended Minn. Stat. § 17.83 (1981) to provide that when an agency was adopting rules which may have a direct and substantial impact on agricultural lands, it must include that fact in the notice of hearing and must further inform the commissioner of agriculture of that fact, in writing. Additionally, the statement of need and reasonableness must describe the possible adverse effect on the agricultural lands and discuss the alternatives considered. Section 6 of the law amended the APA to cite to the amendments to Minn. Stat. § 17.83. Obviously, this amendment created an additional burden on state agencies in rule adoption. Whether the legislature considered the additional delay or costs to the agencies in the rulemaking process versus the benefits to the agricultural land at the time of the amendment is not known to this writer as very few state agencies were aware of the amendments and thus did not testify at any committee hearings on the legislation.

1982 Minn. Laws, Chapter 560, §§ 10, 32 and 33. This bill recodified the laws relating to the Commissioner of the Department of Employee Relations. The law allows the commissioner to develop "administrative procedures" which are exempt from the provisions of the APA. The administrative procedures are to be procedures relating solely to internal management of the state and are not to have any direct or indirect impact on the rights of citizens in dealing with state government. Sections 32 and 33 amended the personnel law to clarify the provisions relating to appeals by employees from disciplinary action when the employee does not have a collective bargaining agreement which contains specific grievance procedures. The amendments allow that employee the right to appeal a discharge, demotion, or suspension directly to the chief hearing examiner who is to assign the case to a hearing examiner. A hearing is conducted at the expense of the disciplining agency and the decision of the hearing examiner is a final decision appealable by the employee or the agency to the courts.

1982 Minn. Laws, Chapter 562. This bill directly amended the APA. The bill responded to a problem discovered in temporary rulemaking. It was proposed jointly by the Department of Human Services and the OAH. Previously, temporary rules were allowed to be effective for 90 days plus an additional 90 days if a notice was published. That section was amended to provide for 180 days without any extension. This amendment allowed an additional 180 days following a notice. Testimony supporting this provision came from several agencies which had found it difficult to be able to publish temporary rules and permanent rules at the same time and complete the entire hearing process within 180 days. This testimony included direct testimony from the OAH which had found it nearly impossible to complete the process of adopting permanent rules for workers' compensation within 180 days. The second section of this bill amended Minn. Stat. § 256B.02, subd. 8, relating to the Department of Public Welfare's drug formulary which had previously been allowed to be adopted without complying with the APA. This had been changed to allow temporary rulemaking and this amendment specifically allowed a change in the fixed dispensing fee to be accomplished under temporary rulemaking but limited any change to 180 days.

1983 (The APA is now recodified as Chapter 14.)

1983 Minn. Laws, Chapter 138. This bill amended Minn. Stat. § 14.38, subd. 6, to exempt rules of the Game and Fish Division of the Department of Natural Resources from approval of their form by the revisor of statutes. This bill was proposed by DNR and was found to be necessary to clarify that the game and fish rules were totally exempt from all APA provisions which had been the initial intent. A question had been raised over the revisor's authority.

1983 Minn. Laws, Chapter 188. This was an entirely new provision which became codified as Minn. Stat. § 14.115. It amended the APA to require agencies to give consideration to small businesses in rulemaking. The provisions require agencies to take additional steps in giving notice and considering alternatives when new or amended rules will affect small businesses. If the agency fails to give the notice and consider alternatives, the rules are prohibited from being adopted if the hearing examiner or the attorney general find noncompliance. It further requires each agency to review its rules every five years and to consider, during this review, reducing the impact of the rules on small business. Certain temporary rules and fees under Minn. Stat. § 16.085 were exempted. The LCRAR was required to monitor the implementation of this law.

1983 Minn. Laws, Chapter 210. This was the APA bill for the 1983 session. It accomplished a number of things:

1. It clarifies the authority of the revisor of statutes that all rules, unless exempt, must have approval of the revisor; clarified incorporation by reference as approved by the revisor; clarified procedural steps for filing with the revisor at all stages of the rule promulgation.

2. It changes the statutory language of six months to a computation of 180 days within which agencies must propose rules after a law is passed granting rulemaking authority and requires agencies to give notice to the LCRAR if they do not propose the rules within the deadline.

3. Clarifications were made to what must be included in a mailed notice of rulemaking.

4. The time for keeping the hearing record open following a hearing was expanded by three days to allow agencies an opportunity to respond to proposed amendments and comments filed by members of the public.

5. This clarified the deadline for the adoption of rules by changing the term "six months" to "180 days" after receipt of the report of the hearing examiner but excludes the time for the chief hearing examiner's review, the attorney general's review or any review by the LCRAR.

6. Clarifications were added to the notice requirements for notice and comment rulemaking and added the requirement, under notice and comment rulemaking, that rules are to be submitted to the attorney general within 180 days at the end of the comment period or the rules are prohibited from going forward.

7. The OAH authority relating to court reporters was changed to specifically allow parties to hire their own court reporters when the OAH determined to keep the record by an audio magnetic recording device. (This is identical to the change which was made for workers' compensation during the 1981 Third Special Session.)

1983 Minn. Laws 1983, Chapter 247. This bill created the Minnesota Court of Appeals. Previous to the implementation of this law, appeals from administrative agencies went directly to the district courts in the state, either Ramsey County which is the seat of state government, or the district wherein the action arose. This bill changed the jurisdiction for appellate review of administrative agency decisions to the newly-created Court of Appeals. This included review of contested case decisions and review of adopted rules.

1983 Minn. Laws 1983, Chapter 290. This was the 1983 workers' compensation reform bill which was discussed in a previous chapter. The bill did increase the complement of the OAH by two positions to allow for the hiring of a workers' compensation specialist to assist the judges in computation of benefits and for the hiring of an assistant chief hearing examiner. Procedurally, the bill removed jurisdiction for medical disputes from the compensation judges and gave such jurisdiction to the commissioner of DOLI. A requirement that medical evidence be submitted by report only unless the compensation judge determined that full medical testimony was crucial to the determination of the employee's entitlement to benefits was added. A provision was added to allow DOLI, the WCCA and the OAH to adopt joint procedural rules. The approval of attorney fees was changed from the requirement that all fees be approved to an automatic award of up to $6500. It removed the jurisdiction for determining excess fees from the WCCA to the WCJs. The bill established administrative conferences for all notices of intention to discontinue, following which the aggrieved party can file an objection to discontinuance or a petition for discontinuance depending on the determination of the commissioner. It also specifically allows for the filing of affidavits of prejudice similar to that in district court in workers' compensation cases. Clarifications were made to the notice of hearing provisions to assist the OAH in its work. An amendment was added to allow non-attorneys to file petitions for intervention from the Departments of Human Services and Economic Security. (This amendment was necessary because the WCCA had ruled that only attorneys could make filings on behalf of those two agencies.) Clarifications were added to the provisions requiring decisions by compensation judges in order to clarify the content, format and timing of the decisions which also included the requirement of decisions being issued within 60 days or the judges were to suffer a loss of pay. Clarifications were added to the provisions for transcripts in order to delineate who is responsible for the preparation of the transcript in case of appeals. The jurisdiction of the WCCA was limited to only those issues specifically listed in the notice of appeal by the parties, thus prohibiting the WCCA from taking up issues it determined to decide on its own motion. The standard of proof for hearings was set at a preponderance of the evidence while removing all language relating to "remedial legislation". The "conclusive presumption" for settlements was limited so that it does not apply to full, final and complete settlements of rehabilitation or medical issues.

1983 Minn. Laws 1983, Chapter 299. This was the bill which established salary ranges for department heads. As passed by the House of Representatives, the chief hearing examiner's salary was established at the same salary as the district judges for the state courts. This was an effort to keep the chief hearing examiner's salary ahead of the WCJ's whose salaries had previously been established as a percentage of the district court judges as had the WCCA judges. As finally passed, the chief hearing examiner's salary was established in a range of $50,000 to $60,000 to be determined by the Governor. (In 1984, the Governor determined that the chief administrative law judge's salary should be the same as the district court judges but given the law could not set the salary at the same level because the top of the range would have had to have been exceeded.

1983 Minn. Laws 1983, Chapter 301. This was the 1983 State Departments Appropriations Bill. Section 15 of this bill was a rider to the appropriation to the OAH which established the study of alternative dispute resolution to be headed by the LCRAR. The LCRAR was to include the OAH, the State Planning Agency, and the Bureau of Mediation Services in the study. Section 64 of the bill contained language which was intended to clarify the fee setting provisions of the APA which allowed agencies to set fees without going through a rulemaking hearing. (As will be seen later, these amendments added further confusion and required changes during subsequent legislative sessions.) Section 148 through 152 of the bill amended the workers' compensation law by limiting the authority of the WCCA, on their review of a WCJ's decision, to the substantial evidence test and further prohibited the WCCA from disregarding findings of fact of the workers' compensation judge. The purpose of this amendment was to give more weight to the compensation judge's findings with the hope that this would reduce the number of appeals filed in workers' compensation matters. (The percentage of appeals of compensation judges' decisions had risen to 47.6% during FY 83. This percentage dropped to 43.1% for FY 84, 42.2% at the end of FY 85, and was 45% at the end of the first six months of FY 86. However, the amendments have had the effect of reducing the percentage of cases reversed by the Court of Appeals. Prior to the amendments, the Court of Appeals had been reversing at the rate of approximately 22%. For the second quarter of FY 86, the percentage of reversals had been reduced to 16%.)

1984

1984 Minn. Laws 1984, Chapter 567. This bill amended the Minnesota Human Rights Act by authorizing the OAH to adopt "policies" to provide sanctions for intentional and frivolous delays while discrimination cases were being investigated or prosecuted. It also provided that parties could file their cases directly with the OAH if the Department of Human Rights had failed to find either probable cause or no probably cause within a specified time period. Finally, a clarification on the amount of damages to be awarded was made to allow the imposition of treble damages in certain situations.

1984 Minn. Laws 1984, Chapter 640. This was the 1984 APA bill which was the result of more than six months of meetings conducted by the Administrative Law Section of the Minnesota Bar Association and a committee appointed by the chairman of that section. The committee contained representatives of state agencies, the attorney general's staff, public interest groups, and private sector lawyers and businesses. While a great number of changes to the APA were considered by this committee, because the committee could not reach a consensus on major changes, the bill eventually proposed and passed did not contain as many significant changes as had originally been assumed were going to be made. However, several significant amendments were made as follows:

1. During the pendency of this legislation, the Department of Economic Security had received word from the federal government relating to social security disability determinations. The federal government was attempting to remove some cases from the federal administrative law judges and had requested the 50 states to establish a disability determination unit within their states. The establishment of such a unit would clearly have come within the definition of a contested case. The department proposed an exemption to the APA with the support of the United States Department of Health and Human Services. The legislature granted an exemption from the APA for this unit so that it would remain within the Department of Economic Security. (Subsequent investigation of other states has determined that the

disability determination programs in other states are conducted by independent hearing units within those states.)

2. "Temporary" rules were changed back to "emergency". Following the 1980 changes and the use of the word "temporary", the legislature had passed numerous bills containing temporary rulemaking authority. It was thought that the use of the word "temporary" had been the reason for the increased use of this rulemaking provision. The intent was that rules be adopted solely under emergency situations and thus the term "emergency" was replaced in the statute.

3. Rules which incorporate by reference other materials, are required to specifically state that they are incorporating other material by reference and what those materials are.

4. The procedures for filing rules with the revisor of statutes were clarified.

5. In order to allow parties an opportunity to review what an agency proposes to utilize in support of its rules before the notice of hearing is issued, a provision requiring the preparation of a statement of need and reasonableness before an agency orders the publication of a hearing notice was added. (It should be noted that through an oversight this provision does not apply to notice and comment rulemaking.)

6. Several amendments were added to clarify the provisions of the APA without changing their meaning. One was to restructure the language in the APA to give emphasis to notice and comment rulemaking rather than giving emphasis to rules being adopted following a hearing.

7. The number of persons required to force an agency to go to hearing on rules was raised from seven to twenty-five. The number 25 was picked from the 1981 Model State Administrative Procedure Act and was a compromise between competing interests.

8. Certain of the procedures relating to the public hearings were clarified including requirements on the agency, questioning of persons who testify, and clarifying the authority of the hearing examiner to limit repetitive or immaterial oral statements and questioning. The three extra days which had been added to the law in 1983 for the agency to respond was extended by allowing all parties an opportunity to respond during the three days. Another clarification amendment related to procedures for review of rules by the hearing examiner and the chief hearing examiner.

9. One of the most significant amendments to the APA in 1984 related to the problem of emergency rulemaking. The APA was amended to limit the authority of an agency to adopt emergency rules to 180 days after the effective date of a law giving the emergency authority, with certain exceptions for agencies issuing bonds. This limitation was necessary, in the eyes of some, because several agencies had obtained temporary rulemaking authority in 1982 and had not, as of the 1984 session, adopted any rules. Thus, this "use it or lose it" provision was added to the bill. (Of interest to some will be the fact that several laws passed during the same legislative session specifically exempted temporary rules in those laws from this provision.)

10. The APA listed, for the first time, the specific materials which were to be included in the rulemaking record.

11. Of significance to the staff of the OAH was the change in title from hearing examiner to administrative law judge. This change in title brings Minnesota into conformity with the federal government and the majority of states in titles for their administrative hearing officials.

12. A clarification was made specifically authorizing unclassified positions within the OAH. It had been thought that the OAH had this authority when it obtained additional positions in 1983 for the workers' compensation

section. Because of a difference of opinion of the placement of a comma in Minn. Stat. Ch. 43 (1984), this additional authority was requested and obtained. (The positions utilized by these unclassified positions were the positions of administrative assistant and the assistant chief administrative law judge.)

1985

1985 Minn. Laws, Chapter 305, Article 6, Section 15. This law, originally intended to be a recodification of the state liquor laws, amended a provision of law which had previously been interpreted by the Minnesota Supreme Court to allow political subdivisions to suspend or revoke liquor licenses without hiring the OAH even though it had to comply with the other provisions of the APA. During the recodification process, this section of the law was amended so that the political subdivisions, when suspending or revoking a liquor license, are required to use the entire Chapter 14, which thus requires use of an ALJ of the OAH to conduct the hearings.

1985 Minn. Laws, First Special Session, Chapter 4, Section 1. This provision eliminated an exemption previously obtained by the Department of Public Safety from the rulemaking provisions for rules adopted under Minn. Stat. § 169.128 relating to DWI license suspension. This section of the law specifically repealed the rules which had been adopted under the exemption and required the agency to follow the full APA in adopting its rules.

1985 Minn. Laws, First Special Session, Chapter 10, Sections 34 through 38. These sections require the preparation of fiscal notes by agencies for all rules if the rules will result in increased, mandated costs to local agencies. (Of concern is the fact that a new definition of "rule" is added to the law which is not identical to the definition of "rule" in the APA.)

1985 Minn. Laws, First Special Session, Chapter 13. This was the State Departments Appropriations Bill. It contained a number of significant amendments impacting the OAH and the APA as follows:

1. The funding for the workers' compensation section of the OAH was transferred from the state general fund to the special compensation fund. This amendment has the effect of removing the costs of the workers' compensation system from the taxpayers of the state to the employers and insurers, including all state agencies and all self-insured employers.

2. Agencies are specifically prohibited from contracting with persons from outside of their agency for the drafting of rules unless they obtain the approval of the revisor of statutes.

3. The revisor of statutes is required to assess the costs of both drafting rules and reviewing rules directly to the agencies.

4. The attorney general is required to assess the costs of their required review of rules and all other services provided to state agencies to the agencies.

5. The LCRAR, having been faced with an ever-increasing number of petitions for review of rules, obtained a provision amending the APA to specifically allow the LCRAR to request the OAH to conduct hearings for it, the cost of the hearings to be borne by the agencies whose rules were the subject of the hearing, provided that the rules had not been adopted following a hearing conducted by the OAH.

6. The chief ALJ was specifically authorized to adopt procedural rules for voluntary mediation, including rulemaking, except for disputes which were within the jurisdiction of the Bureau of Mediation Services.

7. Amendments to the APA were adopted specifically allowing the chief ALJ to delegate certain responsibilities to subordinates provided that the delegations are filed with the secretary of state. These amendments were necessitated because the secretary of state had indicated that the chief ALJ was without authority to delegate responsibilities.

Other Internal Changes to the OAH.

In addition to the changes discussed above, including legislative changes, during the last four years the OAH has continued its efforts to streamline the office. In this regard, the OAH has continued its search for better ways of managing its calendar of cases. As discussed in Chapter 7, the OAH has developed a computerized program for the scheduling of cases for workers' compensation. This was a result of DOLI obtaining approval for the computerization of its workers' compensation records. As the OAH receives approximately 10% of the total number of cases filed at DOLI, the OAH began utilizing the same computer as had been purchased by DOLI. DOLI had purchased a mainframe computer from the Sperry corporation and its MAPPER software system.. Sperry terminals were installed at the OAH and a telecommunications hookup to the DOLI mainframe was installed. While the system was originally "sold" on the basis that employees of DOLI and OAH could very easily learn to prepare the "runs", which were actually computer programs, we found it extremely difficult to train our existing staff to perform this function. Therefore, it was determined that we should utilize salary savings from vacant positions to contract directly with the Sperry Corporation for consultant services to complete the computerization of the records at OAH. This proved to be a cost-effective way of achieving the desired results in the least amount of time possible. However, we quickly found that even Sperry had miscalculated the amount of time necessary to write the runs to computerize the calendar system of the office. However, effective February 1, 1986, the total automation of the record-keeping, assignment of cases, scheduling of cases, issuing of pretrial orders and hearing notices will be accomplished. The end results of this automation will be increased efficiency of the office, quicker response to questions from the public, our calendar judge being able to hear cases 50% of the time, thus increasing the number of cases we are able to dispose of each year, and providing needed managerial reports from the data found in the records of the office which are presently obtainable only through a manual system.

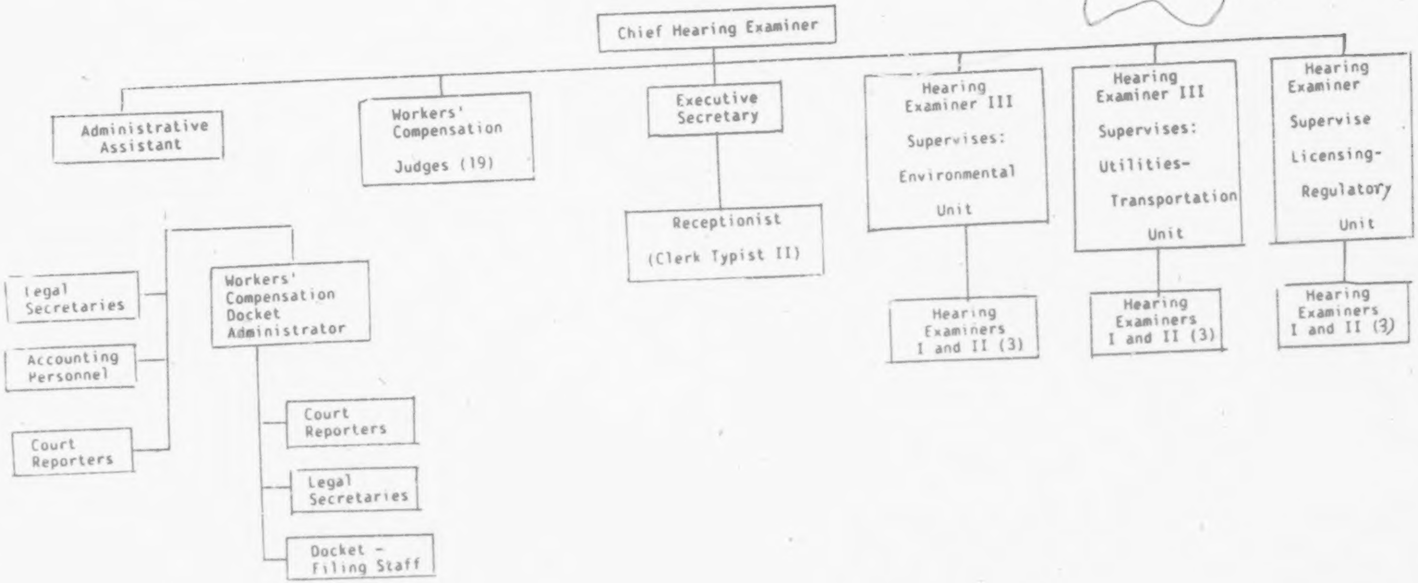
While working on the Sperry system for workers' compensation, the OAH continued to look at methods of upgrading its existing word processing system so as to be able to make its record-keeping and scheduling of cases in the APA section more efficient. During 1985 the office upgraded its existing Wang WP system to a Wang VS 65 system which gives the office both word processing and data processing capability. Software has been purchased to upgrade the time-keeping and billing system of the office so that invoices for services of the office can be generated up to ten days earlier, and to reduce the margin of error in any billings. At the same time, the system will provide the computerization of the docketing and calendaring system. At the present time, cases are docketed manually and are set based upon telephone calls from agencies to the chief ALJ or a supervisory ALJ. It presently takes from ten minutes to 30 minutes to schedule a case depending upon the amount of information necessary before we can notify an agency of the date, time and place of the hearing and the ALJ assigned. The new system will allow the same process to occur in less than three minutes by having terminals in the offices of the supervisory ALJs and the chief ALJ. As in the case of workers' compensation, by entering all of our calendar and docket information on the Wang VS system, we will be able to generate reports much more quickly, will be able to monitor our billings much more carefully, and will be able to respond to questions from the public much more rapidly.

As with most computerized systems, vendors of the systems continue to say that their equipment is "user friendly". However, we have found that it will be necessary for the office to hire a full-time person to continue to monitor and work with both of our computer programs. However, the utilization of the computerized systems has allowed us to reduce the number of support staff anticipated to be necessary so that no new positions will be necessary to fulfill our needs. In fact, it is anticipated (hoped) that the upgrading of our system will result in the reduction of support staff by one and possibly two full-time positions. However, we will not be able to make this final determination until the end of the current biennium.

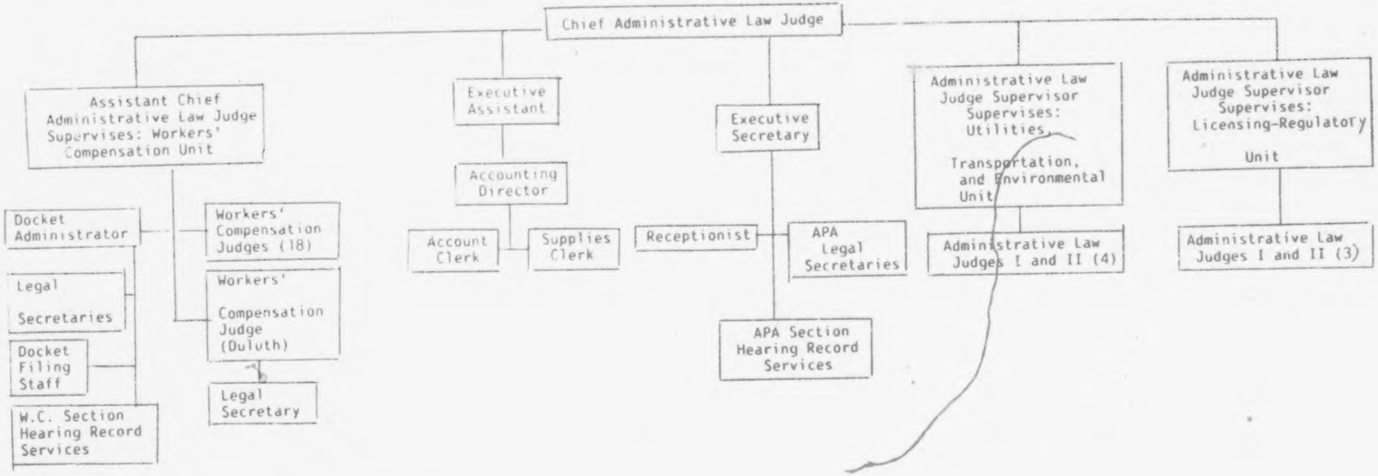
As a result of the various changes made internally both as required by legislative changes and by attempting to bring more efficiencies to the office, the office established a new organizational structure as of July 1 of 1984. This followed the hiring of an assistant chief administrative law judge to directly supervise the entire workers' compensation unit. Additionally, instead of three units within the APA section, the utilities/transportation unit was combined with the environmental unit for the purpose of supervision. As part of this reorganization of the APA section, ALJs were transferred from one unit to another in order that they may develop expertise in additional areas of the law. This "cross-fertilization" had been occurring over a lengthy period of time. The office has been using ALJs with a high degree of expertise in a given subject matter area to assist in the training of other ALJs. As an example, the office "inherited" five hearing examiners from the public service commission who had expertise in transportation and utility matters. Only one of these five persons remains on the staff today. This person has continued to assist in providing training from his experience and background to other ALJs as we have moved these other ALJs into the utilities/transportation unit. Thus, while the office continues to operate under its mandate of attempting to assign persons with expertise in the subject matter to all hearings, we have continued to utilize nearly all ALJs in all areas. We are able to do this because of the highly professional staff in the office who are willing to work with each other and to assist each other in the fulfillment of their responsibilities under the law.

The organizational structure for the office which was implemented on July 1, 1984, and which remains in effect as of January 1, 1986, if found at the end of this chapter.

MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
ORGANIZATION STRUCTURE
AS OF JULY 1, 1981


Chief Hearing Examiner
Administrative Assistant
Workers' Compensation Judges (19)
Executive Secretary
Receptionist (Clerk Typist II)
Hearing Examiner III Supervises: Environmental Unit
Hearing Examiners I and II (3)
Hearing Examiner III Supervises: Utilities-Transportation Unit
Hearing Examiners I and II (3)
Hearing Examiner Supervise Licensing-Regulatory Unit
Hearing Examiners I and II (3)
Legal Secretaries
Accounting Personnel
Court Reporters
Workers' Compensation Docket Administrator
Court Reporters
Legal Secretaries
Docket - Filing Staff

MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
ORGANIZATION STRUCTURE
AS OF JULY 1, 1984


Chief Administrative Law Judge
Assistant Chief Administrative Law Judge Supervises: Workers' Compensation Unit
Docket Administrator
Legal Secretaries
Docket Filing Staff
W.C. Section Hearing Record Services
Workers' Compensation Judges (18)
Workers' Compensation Judge (Duluth)
Legal Secretary
Executive Assistant
Accounting Director
Account Clerk
Supplies Clerk
Executive Secretary
Receptionist
APA Legal Secretaries
APA Section Hearing Record Services
Administrative Law Judge Supervisor Supervises: Utilities, Transportation, and Environmental Unit
Administrative Law Judges I and II (4)
Administrative Law Judge Supervisor Supervises: Licensing-Regulatory Unit
Administrative Law Judges I and II (3)

Chapter 9

A Look to the Future
Recommendations for Change

The creation of the independent OAH has been hailed by some as the greatest advancement in bringing credibility and professionalism to state administrative law practice since the first adoption of an APA in this state. On the other hand, there are those that are heard to say that the creation of the OAH has merely added another layer of bureaucracy to state government, results in too much formality in many hearings, is time consuming and costly, fails to deliver necessary expertise and is an infringement on the decisionmaking authority of state agencies. Not too surprisingly, the supporters come from the legal profession and the private sector while the detractors come primarily from within state agencies and representatives of some special interest groups, both yearning for the return of the "good old days". Exactly what is meant by the "good old days" is better left to the reader's imagination. However, no persons have been heard to dispute the fact that the creation of the OAH has brought uniformity in both procedures and decisionmaking format to the administrative process as well as being a giant step toward bringing governmental action into the "sunshine".

A prime example of why the interjection of an independent, professionally trained fact finder is important to the integrity of the administrative process is the recent discussion relating to the propriety of commissioners, directors or other agency heads working for those they regulate either prior to or subsequent to their employment in state government. It is a fact of life that those regulating a particular industry must have some amount of expertise in the subject matter of the laws. This expertise only comes from practical experience prior to appointment or "on the job" learning experiences. Part of the job of regulating is to come into frequent contact with those being regulated. To do otherwise would be to keep one's head in the sand and remain ignorant of what is happening in the "outside world". State agencies' personnel are in a "no win" situation in this regard. On the one hand, if they refuse to meet with or talk to those regulated by the agency, they are accused of ignorance of the industry, egotism, and shortsightedness. On the other hand, if they are seen to meet with those regulated, they are accused of "selling out" to or being "in bed with" the regulated industry.

The OAH brings a reasonable buffer into the process by providing an open forum for discussion of ideas (in rulemaking), requiring agencies to make a full and complete record prior to their decisionmaking, and through the insertion of an impartial fact-finder. Lest there may be those who would scoff at the importance of the impartial fact-finder, case after case coming from the Minnesota courts have indicated quite clearly the importance of the process. Agencies cannot ignore the findings, conclusions and recommendations of an ALJ. Rather, agency decisionmakers must show a familiarity with the record of the proceedings[67], may not merely rubber stamp the ALJ's report[68], and must clearly explain any divergence from the report, pointing to evidence in the record supporting rejection of the ALJ's findings or recommendations.[69] Agencies may reach their own conclusions in a case but if they are different from the ALJ's, the difference must be explained.[70]

The OAH has tried to listen to its critics and to respond to constructive criticism or positive suggestions for improvement. The use of an internal policy relating to the implementation of a uniform format for the issuance of contested case reports in November of 1980 was the result of discussions with state agencies and lawyers appearing before the OAH. The legislative adoption of new procedures allowing agencies to take certain licensing actions without first conducting a hearing was a direct result of discussions with agencies and practitioners who were heard to complain about costs and delays.[71] the adoption of a "notice and comment" rulemaking process for noncontroversial rules in 1980[72] was first proposed to the 1979 APA Task Force by the OAH after discussions with agencies and a review of past rulemaking hearings. The implementation of an anonymous questionnaire which is sent to parties to a hearing following issuance of the ALJ's report was due in part to comments from attorneys who had some reluctance to lodge complaints about an ALJ and in part due to our looking for better ways of evaluating the performance of the ALJ. The implementation of a formal training program which includes training in areas of substantive law such as workers' compensation, discrimination law, public utilities regulation, etc. is in response to the need for subject matter expertise while courses on alternative dispute resolution are the result of persons seeking less onerous procedures for resolving disputes. In 1984-85 the OAH attempted to amend its procedural rules to provide for less formal procedures for certain classifications of contested cases. While everyone supported the effort, it failed due to a lack of statutory authority to adopt classifications and thus "mandate" specific procedures for certain types of cases.

While attempting to respond to constructive criticism and positive suggestions for change, as well as being mindful of its charge to conduct fair, expeditious and less costly hearings, the OAH has also continued to monitor the APA, changes proposed, and to provide a neutral position in many legislative discussions relating to the APA. The OAH has taken the position that the purpose of the APA is to provide a uniform and open administrative process whereby agencies proposing action must establish the reasonableness of their proposed action, prove their case, before they can take any action, while at the same time providing an opportunity for the public to participate fully in the administrative process. In so doing, the OAH has sometimes taken positions on proposed legislation which has been viewed as anti-state-agency or pro-state-agency, depending on the nature of the issue, the position taken, and the viewpoint of the critic. The old adage that 50% of the people will be upset with a decision regardless of which way it goes therefore applies not only to decisions issued by the OAH but in its legislative proposals.

The numerous changes to the APA over the past decade, as enumerated in preceding chapters, have done much to improve the process by which governmental agencies establish policies and take actions which affect the lives of the citizens of this state. However, even though the Minnesota APA presently imposes what most consider to be the most onerous, time consuming and costly requirements for rulemaking in the country, there remain those who believe that even more stringent requirements should be imposed in order to correct actual or perceived "loopholes" or problems in the rulemaking process. When discussing the existing provisions relating to adjudicative proceedings (contested case) concerns continue to be expressed although not as often nor as loud as when discussing rulemaking. The OAH shares some of these views while at the same time remains concerned that in attempting to correct the deficiencies, more problems might be created.

The OAH supports a continuing review of the administrative process. However, rather than a piecemeal or "band-aid" approach which has occurred from 1976 to 1985, perhaps it is time to step back and take a comprehensive look at the entire APA just as was done in 1974-75. Much has happened in the field of administrative law over the past decade, not just in Minnesota but nationwide. A new Model State APA has been published by the National Conference of Commissioners on Uniform State Laws. There are now ten states which have adopted provisions creating an independent agency much like the OAH while 18 other states and the United States Congress are presently considering similar legislation. There have been numerous decisions issued by the United States Supreme Court, the Minnesota Supreme Court and the Minnesota Court of Appeals relating to administrative practice and procedure which should be reviewed for the purpose of codifying or legislatively overruling them. With these factors in mind as well as the problems previously discussed, the following recommendations for discussion or change are being proposed.

Rulemaking

A. The LCRAR's rule suspension authority should be repealed because of its very questionable constitutionality. Instead of creating a new joint legislative commission on regulatory oversight as is being discussed for the 1986 Legislative Session, the role of the LCRAR should be reviewed and, if deemed appropriate, expanded to include the functions presently being proposed for the new joint commission. For those that fear that loss of rule suspension authority will result in a diminution of the effectiveness of the LCRAR, consideration should be given to the provisions of sections 3-203 and 3-204 of the 1981 Model State APA. Those sections are all encompassing and in some instances have proven effective in other states. Of particular significance to those sections is the authority of the commission to "object" to the provisions of a proposed rule. Unless the objection is removed, if a rule is challenged, the burden is upon the agency to establish that the whole or portion thereof objected to is within the procedural and substantive authority delegated to the agency. At present, a person challenging a rule has the burden of proof at court. This shifting of the burden of proof has proved to be an effective legislative oversight mechanism in the State of Florida.[73]

B. Agency Bulletins. As discussed in Chapter 2, the issuance of bulletins or guidelines by agencies was one of the prime motivating factors behind the 1975 APA amendments. Recently, the same issue has come to the attention of at least one legislative committee.[74] The issue is: How can agencies effectively communicate with those regulated by the agency without constituting illegal rulemaking? The APA and court decisions are very clear. Rules must be adopted, amended, suspended or repealed only in compliance with the APA. Any agency statement of general applicability and future effect made to implement or make specific the law administered by the agency which has not gone through the APA requirements is unenforceable. How then can an agency very quickly inform the regulated of changes required by court decisions or federal law or regulations which would, in effect, amend a duly adopted rule? When an agency issues an advisory opinion, where authorized, or a precedential policy decision following a contested case, how can it inform the regulated without being accused of illegal rulemaking? When an agency has issued a statement which looks like a rule but which has not been adopted as a rule, how can a person obtain a determination of the legality question prior to an enforcement action challenge? If an agency issues an "Order" rather than a "rule", and the order is intended to have the effect of a rule but has not been issued following an adjudicative proceeding, what recourse does a person have other than a judicial challenge? The following suggestions to correct these problems are not meant to be the "only way" but may serve to further discussions which will hopefully result in a proper solution.

> 1. Amend the definition of "rule" as presently found at Minn. Stat. § 14.02, subd. 4 (1984), as follows: "'Rule' means the whole or a part of every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, issued or adopted to prescribe law or policy, implement, interpret or make specific the law enforced or administered by it or to govern its organization or procedure. Every agency statement that meets this definition is a 'rule' regardless of whether the agency labels the statement with another term, such as a policy, informational, interpretive, or instructional bulletin or statement."
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> The foregoing proposal is a combination of the existing definition of "rule", the definition contained at section 1-102(14) of the 1981 Model State APA, and a recently drafted proposal of Mark Shepard of the House Research staff, who is currently assigned to the House Governmental Operations Committee. The intent of these amendments is not to broaden the definition but to make it more specific so as to provide clearer guidance to state agencies' personnel.
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> 2. As is recommended by the 1981 Model State APA at section 1-104, allow for the suspension of the requirements of the APA when necessary to avoid a loss of federal funds or services. The suspension authority should vest in the Attorney General so that a legal determination of the necessity for the suspension can be made.

Placing this authority in the Attorney General will provide a check by a constitutional officer separate from the executive branch agency requesting the suspension. The suspension order should not be subject to the APA requirements for rule adoption as recommended in the Model Act,for to do so would delay the action, possibly resulting in a loss of the federal funds or services sought to be preserved. The proposed language is as follows:

"To the extent necessary to avoid a denial of funds or services from the United States which would otherwise be available to the state, the attorney general by order may suspend, in whole or in part, one or more of the rulemaking provisions of this act. The attorney general by order shall declare the termination of a suspension as soon as it is no longer necessary to prevent the loss of funds or services from the United States. The issuance of the order is not subject to the provisions of this chapter.

If any provision of this act is suspended pursuant to this section, the attorney general shall promptly publish the order of suspension in the State Register and report the suspension to the legislature.

Any suspension issued pursuant to this section shall apply solely to the agency seeking the suspension and solely to the rules required to be adopted, amended, suspended or repealed. An agency which receives a suspension order from the attorney general shall immediately publish the required changes in the State Register and give immediate notice to all persons whose names are registered with the agency for the purpose of receiving rulemaking notices.

3. In cases where an agency has issued a statement which may be thought to be a rule without compliance with the APA, a procedure for immediate review should be established outside of the judicial system. One proposal is for a petition to be filed with the LCRAR. That proposal is contained in a draft of legislation prepared by Mark Shepard of the House Research staff.[75] That proposal appears to call for what could be lengthy procedures, but is certainly worth review. An alternative is to provide for an administrative review which could be conducted under strict timeliness. Guidance for such a provision can be found in the rulemaking procedures in the Florida APA.[76] In Florida, once a rule is proposed or even after adoption, a limited challenge can be made by petition to the director of the Florida Division of Administrative Hearings. The decision of the ALJ is a final determination. The proposal for Minnesota would be to allow a petition to be filed with the chief ALJ with a copy to be served on the agency which issued the statement in question. Within a very short time (3 to 5 working days) the agency must give notice to all persons on the agency's rulemaking list for the subject matter of the statement, or to all persons who received the statement in question, the notice giving the date, time and place for any interested person to appear or present oral comment. The hearing would be limited solely to the issue of determining whether the agency statement in question involved illegal rulemaking, the ALJ's decision being a final decision subject to judicial review by the Court of Appeals and the Supreme Court. Short and specific time deadlines for the hearing, the decision and the appeals should be included.

C. Exemptions. Besides the problem of agencies issuing statements which may be rules, a more pervasive problem is the existence of a very large number of exemptions from the rulemaking provisions of the APA. These exemptions fall into three categories, the first being found in Minn. Stat. § 14.02, subd. 4 (1984), the second and more difficult to ascertain being those found "hidden" in the many substantive laws and statutes, and the third being agencies given authority to do certain things "by rule or order". Each of these categories have caused problems of one kind or another. Each year since 1981 the Revisor of Statutes has attempted to identify newly enacted exemptions. In 1984, the chief ALJ, with the help of the revisor, conducted a review of all known or discoverable exemptions. Before that review could be totally completed, the 1985 Legislative Session began and additional exemptions were created.

The review of the exemptions found that there are nine exemptions specifically listed in Minn. Stat. § 14.02, subd. 4 (1984) (as amended by 1985 Minn. Laws, First Special Session, Ch. 4, Sec. 1, which removed an exemption for the department of public safety) of which two are susceptible of questioning with regard to the necessity for the exemption. In the 1984 compilation of the Minnesota Statutes, the revisor listed an additional eleven exemptions in a footnote. The 1984 review by the chief ALJ included a review of 64 exemptions from the rulemaking provisions, including those discussed above. Of the exemptions reviewed, 21 appear to be questionable as to their propriety or necessity. All should be listed in the APA, at the very least so that persons looking for exemptions will only have to look in one place. (Exemptions created in 1985 are not included in these figures.)

A more difficult problem is the issuance of orders rather than rules. When a law authorizes agency action "by rule or order", is the language intended to allow the issuance of a "rule" without compliance with any APA requirements? Apparently, there is some concern that this question is being answered in the affirmative by some agencies. If this is true, then a clarification is appropriate.

The drafters of the 1981 Model State APA also wrestled with this distinction. In section 1-102, the definition section, the Model Act defines "agency action", "order", and "rule". Each of the definitions must be read in conjunction with the other. The stated purpose of the Model Act provisions is to identify every type of agency activity impacting on the citizens, to establish procedures for the issuance of all actions and to provide for judicial review. The definition of "order" [Sec. 1-102(9)] is clearly intended to apply to agency action taken following an adjudicative (contested case) proceeding. The Minnesota APA should follow the lead of the Model Act and codify what most believe has been the historical intent of the legislature. In short, this is one of the possible "loopholes" mentioned earlier as a concern to some.

Adjudicative (Contested Case) Proceedings

Unlike the rulemaking provisions of the APA, the contested case sections have had very few significant changes during the past decade. While rulemaking has a much broader impact on more people in less time, the most significant cases conducted by the OAH in terms of media attention, legislative interest, costs to the participants, and financial impact on the litigants have been adjudicative proceedings, called "contested cases" under our APA. The OAH has routed high voltage transmission lines, sited large electric generating facilities (power plants), considered the need for expansion of the spent nuclear fuel pool at a nuclear powered generating facility, considered hundreds of millions of dollars in utility rates, been asked to sort through allegations of child abuse, sex abuse, discrimination of every kind and nature, fraud and misrepresentation, considered rates for long term care facilities for the aged and the retarded, and has considered evidence relating to licensing of every regulated occupation and profession except attorneys. Yet, whenever "regulatory reform" is mentioned, only rulemaking is discussed.

It could be argued that as long as there are no concerns being publicly expressed, why "rock the boat"? However, just because there is no large outcry for changes does not mean that the system cannot be made better nor that it is free from problems. It must be remembered that agencies establish policy not only through rulemaking but also through the issuance of orders/decisions following an adjudicative proceeding. As but one example, the Public Utilities Commission establishes policy for the regulation of public utilities rates each time it considers an individual rate case. It can, and has, changed policy on such things as the treatment of charitable contributions on a case-by-case basis. It is through the adjudicative process that agencies interpret statutes where rules are inappropriate, unauthorized or not yet adopted, or interpret their rules where necessary. Thus, can a case be made for the proposition that these proceedings are just as important as rulemaking, especially when an agency considers rulemaking too costly or lengthy and chooses to issue policy on a case by case basis?

The existing APA provisions relating to adjudicative proceedings are in need of review and change in many respects. Costs and delays in the process have been greatly reduced since 1975 but can be reduced further. At the same time, there are exemptions from these provisions, some historical and some new, which are in need of review. The following are some areas for discussion with, in some instances, proposals for change. Decisions were made in the past based upon many factors, not the least of which were political factors. If the same factors do not exist today, perhaps changes should be made. At the very least, a discussion of the issues may lead to the discovery of changes other than those discussed herein which should be made.

A. Publication of Precedential Decisions. Agencies establish statewide policy through adjudicative proceedings. It is a case-by-case process where, usually , only one specific party and the agency are present. Yet, a final determination can have applicability to all other persons similarly situated. The determination in one case is applied as "precedent" in all future similar cases. These precedential decisions are not presently published, indexed or otherwise generally available to the public. The 1981 Model State APA, at section 2-102 speaks to this problem by imposing certain requirements on all written orders before they can be relied on as precedent.

It is recommended that section 2-102 of the 1981 Model State APA, as well as section 1-102(9) which defines "order", be adopted into the Minnesota APA, modified as may be necessary or appropriate.

B. Alternative Dispute Resolution (ADR). Since the legislature mandated a study of this subject, the LCRAR, the State Planning Agency, the Attorney General's Office, the Director of the Bureau of Mediation Services and the chief ALJ have been involved in reviewing ADR. While a final report on this study has not yet been issued, several general conclusions have been reached and several actions have been taken. After several discussion sessions, a short mediation training was provided to the ALJs at the OAH. Thereafter, the departments of human services and natural resources, selected as pilot agencies, reviewed their cases prior to referral for hearing to determine the appropriateness of the cases for mediation. At the same time, ALJs began a review of all cases referred to them to determine their appropriateness for mediation. Procedural rules for voluntary mediation of contested cases were adopted by the OAH. Legislation specifically authorizing mediation of rulemaking was passed in 1985 as previously discussed.

The conclusions reached have been that mediation in the classical labor-relations setting is not appropriate in all contested case proceedings but most contested cases are susceptible to some form of mediation or settlement conference. Another conclusion reached is that state agency personnel need training in mediation/settlement techniques and must be given authority to settle all or portions of disputed issues when attending mediation/settlement conferences. Due to the very high success rate (nearly 100%) in cases mediated to date, the study should continue with greater emphasis placed on training of all agencies' personnel to not only spot cases where settlement is possible, but in the art of settlement discussions. A positive ADR program will save the state and its citizens both time and money and will result in participants turning a "win-lose" or "lose-lose" situation into "win-win".

C. Classification of Adjudicative Proceedings. Because these cases vary so greatly in nature and scope, the formality of the hearings should also be varied so that the issues can be determined in the most timely and cost-efficient manner possible. An ALJ ruled that the OAH is without authority to classify the hearings, a task that was proving to be very difficult at best and one more probably belonging to each agency, subject to general guidelines. The 1981 Model State APA, Article IV, addresses this problem.

It is strongly recommended that the legislature adopt the Model Act concept for classification of adjudicative proceedings. The specific Model Act provisions must be modified to fit the existing Minnesota APA but the concept will work in Minnesota and was the subject of unanimous support at public hearings conducted in 1984. The disagreements arose over which cases were to fit into each of the categories. The Model Act places all cases under the formal procedures until the agencies have, by rule, classified their own hearings within the guidelines found in the Model Act. This same procedure should be workable in Minnesota.

D. Delays in Issuing Final Decisions. Minn. Stat. § 14.62 requires all agencies to render a written decision within 90 days of receipt of an ALJ's report. However, if an agency fails to act, the party seeking a final determination is required to hire an attorney to bring an action against the agency in the Minnesota Court of Appeals. The court may only require the agency to issue a decision "within such time as the court determines to be appropriate". There are no provisions allowing for the recovery of costs, damages or attorney's fees in any case where the agency has unreasonably delayed taking action. The 90-day requirement was added to the law in 1980.[77]

Even with this existing provision, agencies continue to unreasonably delay final action to the detriment of the other party. The most recent example is a case wherein the ALJ's report in a licensing case was issued on April 18, 1984, 15 days after the hearing. There were no exceptions filed by any party. The final agency action, which adopted the report and recommendation of the ALJ in its entirety, was not issued until January 16, 1986. The final decision dismissed the proposed action against a licensee. Pending the final decision, the licensee was left in a state of limbo, arguably to the licensee's financial detriment and most certainly to the detriment of the licensee's emotional condition and respect within the community.

To correct this problem, it is recommended that the legislature adopt the 1981 Model State APA's concept of an "initial order". Under this concept, the ALJ would issue an "initial order" rather than a recommendation. the "initial order" would become the final order unless within ten days the agency head gives notice that the initial order will be reviewed, or upon appeal by any party to the agency head within the same time frame. Thereafter, a specific time deadline should be established for the issuance of a final order by the agency which is mandatory rather than directory, with possible provisions for costs, damages and attorney's fees in the event a decision is not issued within the statutory deadline.

Some might say that this recommendation is "overkill" or that all agencies should not be required to pay the consequences of dilatorious actions of a few agencies. After observing the process for over ten years, I doubt that there are more than a handful of agencies which can honestly state that they have issued all decisions within 90 days. At the same time, when agencies are faced with deadlines which, if not met, will result in the agency losing jurisdiction to take action or funds from its budget, they meet the deadlines.

E. Licensing Cases. Final agency decisions in occupational and professional license disciplinary cases seldom, if ever, involve the issuance of a decision which establishes statewide policy. Rather, they involve an investigation by the agency, a preliminary determination by the agency that the licensee has violated some provision of law or rule, prosecution by the agency, an ALJ's recommendation that disciplinary action be taken or not taken, and a final decision by the agency on whether disciplinary action should be taken and if so the extent of the discipline. At the hearing, the agency must prove its allegations by a preponderance of the evidence which is the lowest standard of proof commonly recognized in civil proceedings.

Several issues have been raised in conversations with practitioners in this area over the past several years. The first issue raised is whether the standard of proof necessary before a licensee can be disciplined should be the higher "clear and convincing" standard. The second issue raised is whether the ALJ should recommend a specific penalty if a violation is proved. The final issue is whether the ALJ's decision should be a final decision rather than a recommendation. These issues and recommendations are discussed below.

> 1. Standard of Proof. It has been said that "preponderance of the evidence" means that if the scales of justice are tipped ever so slightly to one side of the case, that side wins. This is the standard of proof presently applied in all contested cases unless the substantive law provides otherwise. Using a standard such as this does not mean that the party with the most evidence or largest number of witnesses prevails. It is not the quantum of evidence which counts but the quality of the evidence which is important. The "clear and convincing evidence" standard is somewhat higher and requires a better quality of evidence so that the trier of fact is "clearly convinced" of the truth. The trouble with this standard is in its application. We are not faced with jury trials. Rather, a party must convince one person, except in the case of a board, of the merits of their argument. Who is to say whether that fact finder is clearly convinced or merely convinced? In short, does it really make any difference? I think not. therefore, it is recommended that the legislature adopt, by statute in lieu of the present rule, the preponderance of evidence standard of proof for all adjudicative proceedings unless the substantive law provides a different standard.
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> 2. Specificity of Recommendations. At the outset of the establishment of the OAH and adoption of its internal policies and procedures, it was decided that in cases involving disciplinary actions against licensees, no specific penalties would be recommended. Rather, if the ALJ finds that the licensee has violated the applicable law or rules, the recommendation is solely that disciplinary action be taken or if no violation is found to have occurred, that no disciplinary action be taken. In some cases this has led to controversy , not only from the public but from within the OAH. Nevertheless, once established, it was felt that we should maintain uniformity and the policy remains today.
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> It is now recognized that the policy was not correct and that all cases involving disciplinary action should result in a specific recommendation as opposed to the present general recommendation. However, before unilaterally making such a change, it was thought that it would be more appropriate to present the issue to the legislature for its consideration and recommendation or for specific statutory guidance.
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> The arguments against proposing specific penalties include the theory that it invades the jurisdiction of the agency to establish policy through the imposition of penalties and that it is the agency's responsibility to determine what penalty would be in the "public interest", which is the standard in several licensing statutes. The other side of the coin is that the agency should be required to state, at the outset, the penalty it seeks to impose so that the licensee can better understand the implications of an adverse determination and make a more informed decision on any possible settlement. Another argument is that the state should be required to establish the necessity for discipline and the reasonableness of the specific proposal plus the "public interest" evidence where appropriate.
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> A survey of other states which utilize an independent agency to determine licensing cases indicates that every one of those agencies make specific disciplinary proposals. The OAH recommends that the legislature review this issue and specify its intent through legislative enactment. If the legislature discusses the issue but

takes no action nor makes any recommendation one way or the other, it is the intent of the OAH to change its present policy and to begin issuing specific disciplinary action where appropriate.

3. Finality of Decisions. In all cases where the final decision in an adjudicatory proceeding requires the exercise of agency expertise or represents the exercise of a legislative function of establishing policy for the state, the agency should make the final determination rather than the ALJ. However, where the agency has investigated a matter, made a preliminary determination of guilt through its decision to proceed, conducts the prosecution of the case, where an adverse determination may result in the lose of a person's right to conduct a business or pursue a profession and where a final determination does not require the exercise of any special expertise, where should the final decisionmaking authority rest?

On this issue, final decisions are made by independent agencies such as the OAH in the states of California, Missouri, Maine, North Carolina, Wisconsin and Florida in most licensing cases. It is our recommendation that the legislature consider this issue and determine where the final decisionmaking authority belongs. Bringing the issue up for discussion and making a decision one way or another will put this issue to rest.

F. Exemptions. As in the rulemaking provisions, when the APA was amended in 1975, certain exemptions from the contested case provisions were created for one reason or another. As an example, while the Minnesota Municipal Board exemption at Minn. Stat. § 14.03, subd. 1 (1984), was exempted under the guise of the expertise argument, in fact, if it was not able to continue to conduct its own hearings, there would have been little for the Board or its executive director to do.[78] The exemption for unemployment compensation, workers' compensation and hearings conducted by the Bureau of Mediation Services were also based on the expertise argument. However, as those present at the time are aware, that was not the real reason. They were exempted based solely on political reasons, which is entirely proper for a legislative process which, by its nature, is political. As discussed in a previous chapter, the exemption for workers' compensation hearings was partially repealed in 1981 when the workers' compensation judges were transferred to the OAH without a loss of expertise. Why the rest of the workers' compensation division at the department of labor and industry remained exempt was never fully discussed nor explained in 1981.

Some exemptions are appropriate. For example, agencies such as the public employment relations board and the workers' compensation court of appeals, whose sole hearing functions are on appellate review rather than initial hearings, are appropriately exempt. However, the same cannot be said for other exemptions listed within the APA nor for most of those found within other sections of the statute. The revisor has located these exemptions and has published the list as a footnote to Minn. Stat. § 14.03. In 1984, these exemptions were reviewed at the same time as the review of the rulemaking exemptions. Of the total of 35 exemptions reviewed, including those found in Minn. Stat. § 14.03, subd. 2, 17 were found to be of questionable necessity. It is recommended that these exemptions be reviewed along with the questionable rulemaking exemptions. (The foregoing did not include a review of any exemptions which may have been granted in 1985.)

Conclusion

The OAH has completed ten years of existence which is considerably longer than many of its earlier detractors would have guessed or desired. Today, it is a fixture in state government as one of ten central panel systems for administrative hearings in existence in the country. The statistics presented in this report should show that the goals established for the OAH through the 1975 legislation, uniformity of proceedings, reduction of delays and costs of the administrative hearing process, and independent decisionmaking, free from political pressure, have been achieved.

What will happen to the OAH in the future is dependent upon legislative action. At some future time, the remaining exemptions from the APA contested case provisions will probably be removed and all adjudicative hearings brought under a single agency. Either the political reasons for the exemptions will dissolve or pure economics will dictate the consolidation, either in total or at least under one roof with separate directors so that the presently existing duplication of support staff functions such as typing, scheduling, etc. will be eliminated. Whether it will happen next year, within five years or twenty-five years does not really matter. My only hope is that Minnesota will remain a leader in this effort and that total consolidation happens first in Minnesota.

FOOTNOTES

1. 1975 Minn. Laws, Ch. 380, § 60.
2. Shepard, Mark; "Administrative Rulemaking Procedure in Minnesota", 1977-1978.
3. 1945 Minn. Laws, Ch. 452
4. Shepard, Supra.
5. 1945 Minn. Laws, Ch. 590.
6. 1957 Minn. Laws, Ch. 806.
7. Minn. Stat. § 15.0412 (4) (1957).
8. Nobles, James and Wallace, Marcy; "A legislative research report on the Minnesota APA", 1975.
9. 1961 Minn. Laws, Ch. 136.
10. 1963 Minn. Laws, Ch. 633.
11. 1963 Minn. Laws, Ch. 822.
12. 1969 Minn. Laws, Ch. 9, § 6.
13. 1974 Minn. Laws, Ch. 344.
14. 1967 Minn. Laws, Ch. 864, § 4.
15. 1969 Minn. Laws, Ch. 1129, Art. 4, § 5 (M.S. 45.032).
16. 1967 Minn. Laws, Ch. 897, § 20 and 1969 Minn. Laws, Ch. 975, §§ 11-13.
17. 1973 Minn. Laws, Ch. 688, § 3, subd. 8.
18. 1973 Minn. Laws, Ch. 732, § 15.
19. 1967 Minn. Laws, Ch. 882. See also generally Minn. Stat. Chs. 115 through 116G.
20. Nobles, James R. and Triplett, Thomas, "A Staff Report to the House and Senate Governmental Operations Committees on the Minnesota Administrative Procedures Act and its Current Application", (January 22, 1975).
21. Ibid.
22. Information obtained in conversations and meetings with William Brooks from 1972 through present.
23. Peter S. Popovich was appointed to the position of Chief Judge of the Minnesota Court of Appeals upon its inception in 1983.
24. James Nobles was subsequently appointed by the legislature to serve as Legislative Auditor, where he continues to serve with distinction.
25. Thomas J. Triplett was appointed as counsel to the Governor during the first term of Governor Rudy Perpich (1977-78), served as a vice president of the Minnesota Project from 1978-1982, conducted hearings under contract to the OAH from 1980-1982, was appointed to the position of State Planning Director by Governor Rudy Perpich in 1983, and was appointed Minnesota Commissioner of Revenue in 1985.
26. Information obtained in conversations with James Nobles, then a member of the staff of the House Research Department, and Thomas J. Triplett, then a member of the staff of the office of Senate Counsel, Representative Harry A. Sieben and Senator Winston Borden, authors of the 1975 APA legislation. This information was also obtained through my personal observation of the legislative committee hearings.
27. Nobles and Triplett, Supra note 20.
28. Triplett, Thomas J. and Nobles, James R., "Rule-making Under Minnesota's Administrative Procedure Act: 1975 Amendments", Hennepin Lawyer, pp. 14-17 (July-August 1975).
29. 1974 Minn. Laws, Ch. 355, § 69.
30. Minn. Stat. 1984, §§ 14.39 through 14.45 as amended by 1985 Minn. Laws, First Special Session, Ch. 13, § 84.

31. 1975 Minn. Laws, Ch. 380, § 1.
32. Id. at § 16.
33. Id.
34. Id. at § 2.
35. Id. at §§ 7 and 16.
36. Id. at § 1, subd. 3.
37. Id. at § 1, subd. 2.
38. Id. at § 16.
39. Id. at § 16, subds. 1 and 3.
40. Id. at § 16, subd. 9
41. Id. at § 16, subd. 3.
42. Id. at § 19.
43. Id. at § 16, subd. 6.
44. Id. at § 16, subd. 2.
45. Id. at § 16, subd. 4.
46. Id. at § 16, subd. 5.
47. Id. at § 23.
48. 1976 Minn. Laws, Ch. 131, § 1, later codified as Minn. Stat. § 256.045.
49. 1976 Minn. Laws, Ch. 68, § 2.
50. 1977 Minn. Laws, Ch. 203, §§ 1-3.
51. 1984 Minn. Stat., § 171.18.
52. 1976 Minn. Laws, Ch. 341, § 2, subd. 3 (Minn. Stat. 1984, § 169.127, subd. 3).
53. 1977 Minn. Laws, Ch. 346. The legislation applied to the Ethical Practices Board, livestock marketing bond claims and wholesale produce dealer bonds at the Department of Agriculture, industrial loan and thrift applications at the Department of Commerce, ambulance services at the Department of Health, licensing of hairdressing/beauty schools, petitions for motor carrier permits at the Public Service Commission, and railroad crossing permits and authority to eliminate agency service or remove trackage heard for the Department of Transportation.
54. Minnesota-Dakotas Retail Hardware Association v. State, 279 N.W.2d 360 (1979).
55. 1975 Minn. Laws, Ch. 380, § 16, subd. 3.
56. 1981 Minn. Laws, Ch. 346, § 141.
57. Id. at § 7.
58. Id. at § 4.
59. Id. at § 141.
60. Id. at § 106.
61. 1983 Minn. Laws, Ch. 290, § 149.
62. 1983 Minn. Laws, Ch. 290.
63. 1981 Minn. Laws, Third Extra Session, Ch. 2, Art. 1, § 2.
64. Id. at § 10.
65. 1981 Minn. Laws, Ch. 2, Art. 1, §§ 25 and 26.
66. 1983 Minn. Laws, Ch. 290, § 156.
67. PEER, Inc. v. MEQB, 266 N.W.2d 858 (Minn. 1978).
68. Supra.
69. Beaty v. Minnesota Board of Teaching, 354 N.W.2d 466 (Minn. App. 1984); Brinks, Inc. v. Minnesota Public Utilities Commission, 355 N.W.2d 446 (Minn. App. 1984).
70. Supra.
71. 1977 Minn. Laws. Ch. 346.
72. 1980 Minn. Laws, Ch. 615.
73. Discussion with Sharyn Smith, Director, Florida Division of Administrative Hearings, October 1985.
74. On January 10, 1986, Representative Robert Waltman, Chair of the House Governmental Operations Committee's subcommittee on administrative procedures conducted a hearing on the question of agency bulletins versus formal rulemaking.
75. See January 9, 1986, draft of legislation to amend Minn. Stat. § 14.40 (1984), revisor's number [RESDEPT] MS/fa R27000.
76. Florida Statutes § 120.56 (1983).
77. 1980 Minn. Laws, Ch. 615, § 18.
78. Information obtained from former executive director of the board who was responsible for obtaining the exemption and who is now an ALJ at the OAH.

Judge **Palmer**. Thank you so much, sir. Since the last hearing there have been a number of important developments. A substantial number of highly respected organizations and professional associations have now endorsed the proposed administrative law judge corps. They include the American Medical Association, the Federal Bar Association, the American Association of Retired Persons, the American Immigration Lawyers Association, the Judicial Council of the National Bar Association, the State Bar of Wisconsin, and the New York Social Security Bar Association. And of course the Federal Administrative Law Judges Conference, and the Association of Administrative Law Judges, Inc., continue to give their support to this important proposal.

As chairman-elect of the American Bar Association's National Conference of Administrative Law Judges, I must report that the American Bar Association continues to move at a more glacial pace.

The majority of those ABA entities which have considered the proposed legislation are supportive; however, ABA policy precludes a detailed discussion of the positions taken by its various sections and divisions, to allow it to reach a unified position and speak with one voice.

Even so, I would correct an incorrect statement in the "Forum's" prepared statement. The administrative law section did not reject the concept as such; rather, it recommended that an experimental corps, which excludes NLRB and the Social Security Administration judges, be first considered. At any rate, based upon the prevailing sentiment in the legal community in favor of your bill, Senator, it is expected that a strong ABA position in favor of its enactment will be announced in the not too distant future.

Also, since the last hearing, "law review" articles have been published which have analyzed the bill and the testimony received by this subcommittee in 1983, and, by and large, the articles support enactment.

The number of States with central panels has increased since 1983 from 8 to 11, and during the past 2 years, 16 others have either proposed, or are considering the establishment of central panel systems.

Glowing reports on existing central panels have been published, and demonstrate the cost savings and improved quality of decisions such systems uniformly achieve.

And I might add, in response to Mr. Cynkar's stated concerns, about being uncertain that there would be cost savings, and that it might cost more, and might diminish both agency expertise, and the responsiveness of administrative law judges to agency position.

Those arguments were mounted in every 1 of the 11 States that finally adopted central panel systems. I was at a meeting of the Administrative Conference of the United States not too long ago, where a gentleman appeared who said that he was formerly a State legislator in the State of New Jersey, and was very much opposed to the concept when it was proposed but now he believes that it works, it works very well, and experience is the best teacher. But we do have the experience in the States, and, for us to turn away from what the States are doing so well would be foolish.

In contrast with the improvements in administrative adjudication accomplished by State governments, the Federal Government's Social Security Administration has been the subject of several court decisions that verify the problems its judges and claimants seeking entitlements are encountering under the present system.

These problems will be described in detail by others and I will not dwell on that subject.

I would point out, however, that Professor Cofer will speak today who has made a very exhaustive survey, as a professor of political science, of the conditions at the Social Security Administration. She has published a fairly lengthy book on the subject. She has updated it, and she verifies all the charges about the problems in Social Security and how that system operates today, and how it hurts benefits going to claimants.

The object of this bill is to protect the neutrality of administrative law judges, while at the same time assuring that they will be efficient and fully accountable public servants. The proper and efficient management of administrative law judges is not a problem restricted to Social Security by any means.

Twenty-nine agencies presently employ ALJ's. Deregulation has caused some of them to have more judges than needed. Others with more popular missions have been unable to readily obtain the number of judges they need, and those attempting to meet basically short-term workload increases have become subject to costly long-term employment commitments.

And the Interagency Loan Program that OPM operates is not working well. One of the people on this panel is Judge Marvin Morse, who formerly was the Director of the Office of Administrative Law Judges for OPM.

He can describe, in some detail, how it works. Chief Judge Nahum Litt who has been in the position of trying to obtain judges on a short-term basis to reduce the backlog of black lung cases, which now is an embarrassment nationwide, can tell you, and he will tell you today, the problems that he has encountered under that program.

There was also a very scholarly "Law Review" article written by now Judge Antonin Scalia of the Circuit Court for the District of Columbia while he was a professor of law at the University of Virginia, just before he became chairman of the Administrative Conference of the United States. He examined that loan program, and he concluded that for it to work properly it is necessary to have an independent cadre of judges available to be lent to requesting agencies.

Under the present system a large number of administrative law judges will have to be hired and added to the total number of ALJ's, if various laws now before Congress should become law.

Even though the present ALJ cadre is ample to handle those cases I am thinking, in particular, for example, of the program frauds bill and the immigration bill, both of which, in one version or another, have indicated that they should be heard by administrative law judges.

That program frauds bill is particularly critical because they are going to transfer, if the bill is enacted—and the Department of Justice has proposed this; the administration has proposed this—they are going to transfer from the criminal courts the prosecution of people who are accused of defrauding the Government, and give that over to hearing officers who likely will be administrative law judges.

Certainly, they should be in very sense neutral and due process should be attended to. My allotted time has elapsed so I will conclude now and yield to my colleagues. Thank you.

[The statements follow:]

PREPARED STATEMENT OF VICTOR W. PALMER

I. Introductory Remarks For Oral Presentation

Chairman Grassley and Members of the Subcommittee:

I appreciate your invitation to again state the views of administrative law judges who favor the establishment of a corps of administrative law judges.

In order to avoid redundancy, others who previously testified when this Subcommittee first considered this subject in 1983, will not be appearing again, but we ask that their testimony be considered as fully as if given today. We specifically request that such consideration be given to the testimony, statements, and attachments furnished in 1983 by: Judge Edwin S. Bernstein and myself for the Federal Administrative Law Judges Conference; Judge Frank Borowiec for the Association of Administrative Law Judges, Inc.; Judge Duane Harves, Chief Administrative Law Judge for the State of Minnesota; Herbert E. Forrest, Attorney and President of the Federal Communications Bar Association; Professor Abraham Dash of the University of Maryland; Judge Loren A. Smith, then Chairman of the Administrative Conference of the United States; John T. Miller, Attorney and Adjunct Professor of Law, Georgetown University Law Center; Professor Victor G. Rosenblum of Northwestern University; Judge Howard Kestin, then Chief Administrative Law Judge for the State of New Jersey; and Professor Frederick Davis, Dean of the University of Dayton. It is requested that the testimony and data previously furnished respecting the operation of central panel systems by the States of New Jersey and Minnesota be supplemented by inclusion of the recent reports by each State which have been furnished to your staff.

Since the last hearing, there have been a number of important developments.

A substantial number of highly respected organizations and professional associations have endorsed the proposed Administrative Law Judge Corps. They include the American Medical Association, the Federal Bar Association, the American Association of Retired Persons, the American Immigration Lawyers Association, the Judicial Council of the National Bar Association, the State Bar of Wisconsin, and the New York Social Security Bar Association. And, of course, the Federal Administrative Law Judges Conference and the Association of Administrative Law Judges, Inc., continue to give their support to this important legislative proposal.

As Chairman-Elect of the American Bar Association's National Conference of Administrative Law Judges, I am somewhat chagrined to report that the American Bar Association continues to move at a more glacial pace. The majority of those ABA entities which have considered the proposed legislation are supportive. However, ABA policy precludes a detailed discussion of the positions taken by its various constituent sections and divisions to allow the ABA to reach a unified position and speak with one voice on pending legislation. But, based upon the prevailing sentiment in the legal community in favor of Senator Heflin's bill, it is expected that a strong ABA position in favor of its enactment will be announced in the not too distant future.

Also, since the last hearing, law review articles have been published which have analyzed the bill and the testimony received by this Subcommittee in 1983; and, by and large, the articles support enactment.

The number of States with central panels has increased since 1983 from 8 to 11, and during the past 2 years, 16 others have either proposed or are considering the establishment of central panel systems. Glowing reports on existing central panels have been published and demonstrate the cost savings and improved quality of decisions such systems uniformly achieve.

In contrast with the improvements in administrative adjudication accomplished by State governments, the federal government's Social Security Administration has been the subject of several court decisions that verify the problems its judges and claimants seeking entitlements are encountering under the present system. A Professor of Social Science has completed an exhaustive survey of the conditions existing at the Social Security Administration in its employment of administrative law judges and she has concluded that they should be removed from SSA's supervision and control. Moreover, in a very recent update of her survey, she concludes that despite various changes and purported improvements, the underlying problems at SSA persist.

As a preliminary to deciding whether an Administrative Law Judge Corps should be established, the following questions require answers:

What good will it do? Why is it needed?

A centrally managed corps of administrative law judges would guarantee the fairness of hearings that administrative law judges conduct. It would solve problems caused by unequal work loads and varying forms of administrative law judge management and support --- agency-to-agency. It would eliminate the suspicions of bias that necessarily arise out of the subordinate status of ALJs as agency employees. It will allow for the appropriate management of ALJs to make them fully accountable for their conduct and actions without endangering their neutrality. It is also the most moderate solution to pressing problems now afflicting the ALJ system which is materially different from the way it was when the APA was enacted some 40 years ago.

Whereas, in 1947, only 13 ALJs were employed by the Social Security Administration, and over 60% of all ALJs then employed by the Federal government were assigned to cases of the economic regulatory agencies; today, approximately 70%, or nearly 700

ALJs, are employed by SSA and less than 7% now preside over ratemaking, licensing, and formal rulemaking cases - the hearing models typically contemplated in case books and treatises on administrative law. 1/

The large number of ALJs in SSA's employ has led it to undertake management initiatives that other agencies have generally avoided. It has sought to establish monthly production quotas and to actively seek the discipline and removal of ALJs whom it believes to be low performers. These efforts have subjected SSA to attack from every quarter and charges that it is using its status as the ALJ's employer to pressure the ALJs into deciding factual questions on the basis of political considerations. Various congressional committees have concluded that the former Administration pursued employment practices which have now been reversed through equally questionable practices by appointees of the present Administration. 2/ The core issue is whether ALJs at SSA decide cases on the basis of what they believe to be the credible evidence in the cases coming before them - or are they yielding to agency pressures to meet politically oriented goals?

Only Congress can assure the future fairness of administrative adjudications by its enactment of the laws needed to end such agency practices. Practices, I should add, which have come to the attention of the courts and have been listed by at least one District Judge as the reason why decisions by ALJs at SSA must now be treated as unreliable. 3/

The object of this bill is to protect the neutrality of Administrative Law Judges while, at the same time, assuring that they will be efficient and fully accountable public servants.

The proper and efficient management of ALJs is not a problem restricted to SSA by any means. Twenty-nine agencies presently employ ALJs. Deregulation has caused some of them to have more judges than needed for their remaining work (ICC and

OSHRC are prime examples). Others, with more popular missions, have been unable to readily obtain the full number of ALJs they need, and those attempting to meet basically short-term workload increases have become subject to costly, long-term employment commitments. Under the present system, a large body of ALJs would have to be hired and added to the total number of ALJs if various laws now before Congress should become law, even though the present ALJ cadre is ample to handle those cases. Then too, of the 29 agencies where ALJs are employed full-time, 6 have only 1 judge and 19 have 6 ALJs or less. Obviously, there is great waste in this system which centralization would cure. The General Accounting Office has charged in two separate reports to Congress that the lack of effective and uniform management of ALJs is a major problem plaguing the administrative process. 4/ Many agencies, GAO has charged, practice a policy of benign neglect to, one would imagine, insulate themselves from the kind of public outcry and congressional inquiries which have attended the various management initiatives SSA has attempted to implement.

Placing the day-to-day supervision of ALJs in a central employment unit outside of the agencies whose cases ALJs hear would eliminate these impediments to effective management. It would also eliminate the appearance of ALJ bias and the actual, institutional bias that necessarily exists at those agencies where every ALJ is known to be a former staff attorney.

Moreover, 11 States have now established central panel systems to solve similar problems. 5/ Each State has reported the new system to be a complete success, and many others are considering its implementation. The Governor of New Jersey, for example, appointed a Blue Ribbon Commission to investigate and evaluate that State's Central Panel System and, in 1984, it reported: 6/

> "The Committee's investigation led to a conclusion that the Office of Administrative Law was an efficient, well-run organization which represented a significant improvement over the former hearing system in terms of quality and productivity."

Those who nonetheless oppose an ALJ Corps principally complain that it would lead to a diminishment of ALJ expertise, and ALJ responsiveness to the policies of the agencies whose cases they hear. Those objections are without merit.

The bill before this Subcommittee would require the ALJ Corps to consist of distinct, specialized divisions in keeping with the various specialized fields of administrative law. Each ALJ's depth of understanding of these specialties should increase with complete exposure to the full panoply of interpretive nuances placed on guiding principles by the whole body of agencies where they have application.

Knowledge gained through the previous experiences of an ALJ transferred to a division would be available to be shared as a common resource by all. Self pride, peer pressure, and the freshness of problems presented, should motivate each ALJ to update and broaden his knowledge of his chosen specialty.

Some who oppose the Corps concept have suggested that after the Corps' establishment, ALJs will be assigned to difficult cases outside their areas of specialized knowledge and that the divisions will be dismantled. Such arguments make no sense. A little over a year ago, the Research Director of the Administrative Conference of the United States attended the first meeting of Chief ALJs from states with central panel systems and reported that even those without a mandate to preserve specialized expertise have come to recognize its value and have tailored their assignment practices to assure that difficult cases are heard by established experts. 7/ It is to be expected that those who would head the Corps would do the same.

Concerns that ALJs may be less responsive to agency policies under the Corps or that agency policies will be ignored or thwarted, are mistaken. With a Corps in place, each agency shall continue to have review authority over individual ALJ decisions. This power has not been diminished in any State which has a central panel system; and it is not proposed or contemplated by proponents of the federal ALJ Corps.

It should be kept in mind that the only current role ALJs have in respect to the implementation of agency policy is to apply established agency policy. This obligation would continue under the Corps. To the extent an agency does not have an established policy, ALJs have been called upon at some agencies to suggest new policy. But their suggestions do not come out of thin air. They devolve from existing rules and regulations and published policy statements, or in the event those are lacking, testimony presented by the agency's personnel as elaborated by arguments of counsel.

The APA presently restricts, and will continue to restrict, the communication of agency policy by ex parte means. An ALJ decision must be based upon substantial evidence of record and ALJs are totally dependent upon evidence for the exercise of their decisional functions. Furthermore, in light of the fact that an agency continues to have, under the bill before you, ultimate decisionmaking authority under its right of review of ALJ decisions, policy that an ALJ may suggest can never become implemented without an agency's concurrence.

To the extent that a Corps increases ALJ independence from agency influence, it does so only in respect to the ALJ's role as an independent fact-finder. That is the basic premise upon which the APA was bottomed when enacted in 1946. This form of independence was believed then to be absolutely necessary if agency decisions were ever to be considered reliable and trustworthy. Enhancing the independence of that aspect of an ALJ's employment keeps faith with the APA and is essential to the continuing worth of the office.

This concludes my oral remarks, but I ask, Mr. Chairman, that the remainder of this statement and the two accompanying law review articles written since and commenting upon the hearings conducted by this Subcommittee on a similar bill in 1983, be included and made part of the record.

II. The Essential Reasons for Establishing a Corps

We believe that the total separation of administrative law judges from the 29 Executive Departments and agencies, where they are presently employed, is the essential first step to meaningful, regulatory reform.

Until this is done, Americans will never be convinced that they are being given fair hearings by impartial judges. Many of the employing Departments and agencies regularly appear before the judges as party litigants. The agency employing the largest number of administrative law judges is perceived to be pursuing policies designed to thwart the very claims for statutory entitlements that come before the judges for resolution. Neither circumstance engenders public trust and confidence.

The past president of the American Bar Association, Bernard G. Segal, stated the problem in a nutshell: 8/

> Consider, for example, the unavoidable appearance of bias when an administrative law judge, attached to an agency, is presiding in litigation by that agency against a private party. One can fill the pages of the United States Code with legislation intended to guarantee the independence of the adminstrative law judge; but so long as that judge has offices in the same building as the agency staff, so long as the seal of the agency adorns the bench on which that judge sits, so long as that judge's assignment to the case is by the very agency whose actions or contentions that judge is being called on to review, it is extremely difficult, if not impossible, for that judge to convey the image of being an impartial fact finder."

The establishment of a unified corps of administrative law judges would do more than any other single act to strengthen public confidence in our federal administrative system which must be both fair and appear to be fair. It is also the key to more efficient and less costly adjudication.

Statistical data from those states which now employ administrative law judges as members of central panels, show the savings that do result when the judges are brought together in a single corps.

At present, federal administrative law judges are employed by 29 separate Departments and agencies, each replicating the others in the maintenance of Clerk's Offices for the docketing of cases, filing systems, case tracking systems, and systems for preparing statistical reports. They each employ separate staffs of clerks, stenographers, para-legals and other support personnel. Some have modern office equipment that is under-used, others have none. Modern computerized systems for docket management, including the tracking of cases and the preparation of the reports to which Congress and the public are entitled, are already in place both at the Department of Labor and the National Labor Relations Board, and either system would be sufficient to take care of the entire needs of the corps that this legislation would establish. But the greatest savings would come about from increased efficiencies and flexibility in the assignment of judges to cases.

In the absence of an ALJ Corps, there is no practical method for assigning judges at agencies where caseloads are dwindling to the work of those agencies with backlogs. 9/ Programs to loan judges, agency-to-agency, have encountered several practical problems. Should the lending agency continue to carry the judge on its payroll? How much should the borrowing agency pay as "rent" for the judge? If work suddenly picks up at the lending agency, can it retrieve the then needed judge? Moreover, when an agency admits that its own need to hold hearings has diminished to the point that the ALJs in its employ are available for a loan program, the agency exposes its judges, its attorneys and the rest of its hearing process personnel to reduction-in-force actions and budgetary reductions.

The unified corps will be able to adjust the assignment of judges to cases with better correlation to the various peaks and valleys of individual agency caseloads. This would eliminate agency overstaffing to meet surges in adjudicative activities in order to avoid backlogs and constituent complaints.

Furthermore, the bill specifically authorizes federal courts as well as agencies to refer certain types of proceedings requiring hearings to the Corps of Administrative Law Judges. This will identify ALJs as a ready resource to meet pressing problems. Over 1,000 highly trained and experienced administrative law judges will thus become identified as available to assist the courts and every government agency desiring a decision by neutral experts based on a hearing record. As existing caseloads are more evenly distributed among administrative law judges, they will be able to absorb such added duties without incurring added costs.

S. 673, then, would accomplish the following significant objectives:

(1) The actual fairness of administrative adjudications would be guaranteed;

(2) The appearance of ALJ bias would be eliminated;

(3) Significant cost savings would result;

(4) Administrative law judges would be employed more efficiently;

(5) Administrative law judges would be made instantly available to every agency, and would be identified as available to assist, when requested, our overloaded federal courts.

The administrative law judge community, as represented by their major professional associations, supports these objectives.

Administrative law judges support this bill because it will accomplish each objective without disrupting any of the time-proven attributes and safeguards already part of the administrative system. A minority of administrative law judges do not favor the enactment of the bill and would instead preserve the status quo. But it should be noted that when the bill's merits have been debated in our community, the debates have never centered on whether enactment would improve ALJ status or compensation or whether some ALJs might be caused to work harder. ALJ support and opposition to S. 673 is based on individual perceptions of the due process requirements that are applicable to the hearings we conduct.

The bill does not change the current decisional relationships between the judges and agencies. Agency review of decisions by administrative law judges would continue. Each agency would remain the final arbiter of its own policy subject only to judicial review as presently provided under the Administrative Procedure Act (the APA).

Most importantly, the system now in place for the merit selection of administrative law judges is left intact. The system is unique and should not be weakened in any way. It provides that applicants for administrative law judge positions must submit to rigorous written and oral examinations conducted by the Office of Personnel Management to demonstrate their legal expertise. They are further required to produce proof of at least seven years experience as judges or trial lawyers handling complex cases.

Individual judges would continue to be selected on this basis. They would be assigned, however, not to individual Departments and agencies, but to specialized divisions within the corps, in keeping with their particular fields of legal expertise.

At this point, an essential underlying question requires address. Why now, nearly 40 years after the enactment of the Administrative Procedure Act, should administrative law judges be separated from agencies?

III. Changes in the Types of Hearings Conducted

In 1947, over 60% of administrative hearings involved ratemaking, licensing and other forms of rulemaking by the various economic regulatory agencies. In 1982, those agencies accounted for less than 7% of the hearings conducted by administrative law judges. Rulemaking hearings conducted for the consideration of regulatory agencies in their formulation of policy for proscriptive application on an industry-wide basis, occupies a shrinking percentage of the federal administrative judiciary. 10/ Today, an administrative law judge is more likely to hear an enforcement action or a claim for social security benefits. In either case, his or her functions are essentially judicial and are inconsistent with continued status as an agency subordinate.

A. Civil Penalties and Other Administrative Sanction Cases

Accusatory actions by agencies seeking civil money penalties to enforce statutory provisions and administrative regulations were rarely the subject of administrative hearings in 1947. Even as recently as 1965, it could still be said that administrative authority to assess penalties was "rarely conferred" and that "it (was) a close question whether there (was) sufficient advantage in conferring" such power. 11/ But by 1971, 7 executive departments and 13 independent agencies had collected well in excess of $10 million in penalties during the fiscal year, in over 15,000 cases. The Administrative Conference of the United

States (ACUS) reported this as "an important and salutary trend." 12/ It urged the advantages of the "administrative imposition system" stating:

> "The already critical overburdening of the courts argues against flooding them with controversies of this type, which generally have small precedential significance." 13/

ACUS went on to recommend that federal agencies "should evaluate the benefits which may be derived from the use (or increased use) of civil money penalties as a sanction." 14/ This 1972 ACUS recommendation encouraged agencies to impose civil money penalties through APA adjudications on the record, not subject to de novo reviews by United States District Courts, but reviewed instead by United States Courts of Appeals under the APA's substantial evidence rule. 15/

In 1976, the Supreme Court held such enforcement procedures to be constitutional. 16/

By 1979, ACUS was able to report:

> "The civil money penalty has become one of the most widely used techniques in the enforcement programs of federal administrative agencies."
>
> * * * *
>
> "Since adoption of that Recommendation in 1972, the use of civil money penalties in general and of administratively imposed civil penalties in particular has increased significantly, and the constitutionality and desirability of administratively imposed penalties has been widely recognized." 17/

To the growing list of accusatory proceedings conducted by administrative law judges must be added those that enforce statutes by the imposition of sanctions having even harsher consequences: revocation or suspension of a license to engage in a business or profession subject to federal control, withdrawal of inspection services required to sell various products (such as meat) interstate, and the entry of findings which preclude future industry employment. The continued status of administrative law judges as employees of those Departments and agencies which now actively appear before them as prosecutors cannot be justified on any basis. 18/

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. . . . This Court has said . . . that 'Every procedure which would offer a possible temptation to the average man as judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.' Tumey v. State of Ohio, 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14. In re Murchison, 349 U.S. 133, 136 (1955).

B. Claims for Social Security Benefits

In 1947, only 13 administrative law judges heard cases involving the Social Security laws. Today, nearly 700 are so assigned. In 1947, 63.8% of the federal administrative judiciary conducted hearings for economic regulatory agencies, and only 6.6% for the Social Security Administration. That pattern has completely reversed with 67.3% of the judges now hearing Department of Health and Human Services (HHS) cases, and only 6.7% conducting hearings for the economic regulatory agencies. 19/

This is because the requests for hearings by administrative law judges skyrocketed. They increased from 121,500 in fiscal year 1974 to 320,000 in fiscal year 1982. 20/

This phenomenal increase in requests for hearings was the direct result of greater initial denial of applications by state agencies, and aggressive actions taken to terminate previously granted benefits. Using fiscal years 1976 and 1980 as references, the denial rates at the state agency level rose from 41.6% to 60.4% for initial denials, and the reconsideration denial rate increased from 72.3% to 82.2%. In 1982, benefits were cut off from 195,000 beneficiaries after the highest number of reviews of continuing eligibility in the program's history, 471,337.

The increased rates of denial similarly overburdened the federal courts at both the district and appellate levels. At the beginning of 1982, there were 19,000 cases pending and new cases were being filed at the rate of 9,000 every year. Since the federal courts have been able to render decisions in no more than 4,600 social security cases per year, an overwhelming backlog of social security cases now plagues the federal courts.

The explosion in the number of HHS cases thrust upon the courts and the administrative judiciary was the direct result of changes in agency policy, implemented through more restrictive standards for granting disability benefits claims. These restrictive standards differ from those applied by the administrative bench and the federal courts. They were ruled to be "arbitrary, capricious, irrational and an abuse of discretion" by U. S. District Court Judge Earl Larson who ordered 20,000 mentally ill people in the Midwest to be restored to the disability rolls. Mental Health Association of Minnesota v. Schweiker, 554 F.Supp. 157 (D. Minn., December 1982).

The Social Security Administration disregarded admonishments that its refashioned standards were contrary to governing organic law and imposed a policy of "non acquiescence" upon its judges, directing them to disregard court decisions with which it disagreed. 21/

Moreover, as the judges' employer, the Social Security Administration instituted agency review of the decisions by those judges who had granted more than the "average" number of appeals by claimants. 22/ The judges came to believe they were being pressured by SSA to deny claims, 23/ and filed a lawsuit 24/ to stop such practices. The District Court Judge who heard their case agreed that the actions of the agency showed "an unjustifiable preoccupation with allowance rates, to the extent that ALJs could reasonably feel pressure to issue fewer allowance decisions. . . . 25/ The District Court Judge further found that SSA's "insensitivity to that degree of decisional independence the APA affords to administrative law judges . . . could have tended to corrupt the ability of the administrative law judges to exercise that independence in the vital cases that they decide." 26/

However, on the basis of assurances that these practices had been permanently ended, the lawsuit was dismissed. But Professor of Political Science, Donna Price Cofer, found when she made current her comprehensive survey of the SSA hearing process, that similar practices have begun again: 27/

> "(B)ureaucratic pressures upon the ALJs continue to be reality. . . . The use of terminology such as 'goals', 'performance expectations,' and 'performance feedback' (in current memoranda) seems very much like the terms 'targeting', 'goals', and 'behaviour modification', which the federal district court judge pointed to . . . as phrases used by the Agency in the past that could corrupt the ability of ALJs to make independent decisions."

Professor Cofer warns: 28/

> "(T)here are consequences to be anticipated in placing production quotas in the hands of politically-sensitive administrators. Such measures have critically impaired the credibility of the disability determination process in the past, a process which is designed to protect an insurance trust fund to which working Americans involuntarily contribute."

Like Professor Cofer, our concern is with principles of fundamental justice. These ongoing agency practices undercut the right of every disability claimant to a determination by an impartial judge. They subvert the Supreme Court holding that administrative law judges have judicial functions by making them mindful of the consequences of their decisions to the agency and its budget when their exclusive concern should be the merits of each individual case. Butz v. Economou, 438 U.S. 478 (1978);

Nash v. Califano, 613 F.2d 10 (2d Cir. 1980); Benton v. United States, 203 Ct. Cl. 263, 488 F.2d 1017 (1973).

Claimants are made to suffer the abridgement of fundamental protections guaranteed them by the due process clause of the Constitution. That is the ultimate cost of such agency policies and practices.

> Indeed, one might fairly say of the Bill of Rights in general and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials. Stanley v. Illinois, 405 U.S. 645, 656 (1972).

IV. OPM as Protector of the ALJ Program

The Administrative Procedure Act contemplated that the Civil Service Commission, now the Office of Personnel Management, would protect the independence of administrative law judges. The Supreme Court reiterated this responsibility in Ramspeck v. Trial Examiners Conf., 345 U.S. 128, 139 and 142 (1953).

The selection process as currently administered by OPM has become a praiseworthy model for making judicial appointments that should be retained. But, OPM has otherwise failed to distinguish itself in fulfilling its responsibility to the ALJ program.

Lawyers seek to become administrative law judges because they regard the positions to be judicial and intellectually challenging. OPM has the responsibility for attracting and retaining the most qualified lawyers as applicants for administrative law judge positions. However, OPM, by its actions, does little to attract the most qualified candidates, and it customarily demonstrates an institutional resistance to the treatment of these positions as judicial in nature.

In 1983, OPM undertook a governmentwide classification study to link administrative law judge positions to those held by government attorneys who perform "hear and decide type work." 29/ Such a linkage would seriously impair the public perception of administrative law judges as impartial triers of fact who are independent and institutionally dissimilar to the agency attorneys who appear before them. Particularly disturbing to the judges and the legal community were comments by OPM officials that "egregious grade creep" 30/ had affected ALJ salaries. The support for this assertion was a comparison of applicable grades in 1946 and 1983 which ignored the fact that bar membership was not required of candidates until 1964.

OPM has also so far ignored the recommendations of a fact-finding study group sponsored by its predecessor. This study group began work in 1973 and became known as the "La Macchia Committee" for its chairman, the Civil Service Commission's Deputy General Counsel, Philip La Macchia. It reviewed current literature, case law and government statistics. Personal interviews were conducted with every chief administrative law judge, representatives of every federal agency where administrative law judges were employed, and numerous government and private attorneys who customarily practiced before the judges. In addition, questionnaires were sent to the 800 administrative law judges then employed by federal agencies, to all of the agencies where they were employed, to 700 government attorneys, and to 150 attorneys in private practice. Specific responsibility for developing facts and conclusions on various aspects of administrative law judge employment was divided among nine subcommittees. Two special subcommittees were assigned to study the ability of administrative law judges to preside over cases for more than one agency without compromising their expertise. Both subcommittees dismissed the compromise of expertise as a problem, and suggested that the establishment of a unified corps had greater merit and was more feasible than a voluntary loan program. 31/ The Committee wholeheartedly endorsed the Corps concept. 32/

As envisioned by the Committee, the Corps would preserve expertise and meet stated agency objections by being organized into specialied divisions. The Committee's recommendation for a Corps was overwhelmingly supported by administrative law judges. The Committee's collected statistics showed that sixty-nine percent of the administrative law judges who completed the written questionnaire favored a self-administered corps and only eight and one half percent were opposed to its creation. 33/

Another finding by the La Macchia Committee concerned agency practices in reviewing administrative law judge decisions. It found that the resolution of cases was often being substantially prolonged without the substance of the ALJ's decision being materially altered. The Committee recommended the adoption of rules to make administrative law judge decisions final, subject only to discretionary agency review.

In testimony before this Subcommittee in 1983, Professor Victor G. Rosenblum assessed the strength of the Office of Personnel Management's commitment to the improvement of the administrative law judge program subsequent to the La Macchia study. 34/ Professor Rosenblum testified that the various suggestions of the Committee have "lapsed into limbo" and that OPM has demonstrated "truncated enthusiasm" for its Office of Administrative Law Judges. 35/ He cited a GAO study which resulted in the release of two reports, 36/ The reports made it very clear that both the Civil Service Commission, now OPM, and the agencies, failed to heed the recommendation of the La Macchia Committee to curtail inordinate review of the judges' decisions: 37/

> "Although the Administrative Procedure Act was enacted to resolve conflicts promptly and fairly, timely decisions are not being made because the process is burdened with extensive reviews. . . .
>
> . . . . .

> "While agencies have the authority to review Administrative Law Judges' decisions, the process is burdened unnecessarily with multiple layers and numerous agency personnel. This increases the time required to reach a final decision by hundreds of days and the cost by millions of dollars.
>
> . . . . .
>
> "These multilayer review processes also raise doubts that the Act's goals -- making Administrative Law Judges an important factor in the decision process and assuring that agency views are not being unduly emphasized or secretly submitted -- are being achieved."

The GAO investigators were also troubled by inadequate management of ALJ functions; the failure of CSC to maintain and use information showing administrative law judge productivity to evaluate agency requests for additional judges; and its pro forma approval of agency requests to use selective certification for choosing new judges. 38 In the closing chapter of its first report, the GAO restated its concerns and concluded: 39/

> "These criticisms are not new. For the past 30 years, committees, studies, and advisory groups have said substantially the same things. Yet, little has been done by the Congress, employing agencies, or CSC to significantly improve the situation."

A year after circulation of its first report, GAO issued a second report, summarizing its prior recommendations and evaluating the responses. 40/ This report concluded that the recommendations by GAO had been largely ignored and that all who had received copies of the first report were doing "little to improve the administrative law process." 41/

V. The Corps is Needed to Instill Public Confidence

The establishment of a unified corps of administrative law judges is essential to instill confidence in the fairness of the administrative process.

We have given two principal examples of cases heard by administrative law judges which require them to be separate and apart from their present employing agencies. But every member of the administrative judiciary requires this protective insulation.

Proper and efficient administration of the functions and employment of all judges holding their appointments pursuant to Article I of the Constitution, requires that they all be part of a single body having rationally defined divisions where the expertise possesed by each judge may be put to the fullest use.

It perhaps bears brief emphasis here that, as a nation, we have come to increasingly rely upon the substance and procedures of administrative law. As stated by Justice Jackson:

> "The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart."

The 1969 report of the Ash Council is a useful starting point for congressional staff members to begin their review of the widely acknowledged problems of the present-day administrative process; it summarized the first two decades under the Administrative Procedure Act of 1946 and contains a detailed bibliography of the early, pertinent literature. 42/ Recent articles by members of the academic community emphasize the need to guarantee fair administrative hearings through the separation of administrative law judges from executive Departments and agencies. 43/

Various states have taken this step and have already established the equivalent of the proposed Corps. 44/

The federal administrative process will be vastly strengthened by a centrally managed corps of administrative law judges. The "Corps approach" is a natural progression in the continuing evolution of the art and science of administrative law. More importantly, this change will go far to correct longstanding deficiencies in the administrative process. It will prevent the exercise of supervisory dominion over administrative law judges by agencies which are tempted to manipulate the adjudicative process to attain what are perceived to be politically desirable goals. Each agency now chooses who will be its Chief Judge and may choose a pliant person who will readily accede to agency desires rather than act as a bulwark against injustice. Then, too, agencies have very real control over the assignment of their cases, and true mechanical rotation is neither required nor observed. Opportunities for routing an important case to an ALJ whose known predilections favor the agency position definitely do exist. The agency's control over the office space, secretarial and clerical services allocated to each judge; the promptness with which reimbursements are made to a judge for his or her expenses of travelling to a hearing; these are but a few examples of the many ways an agency controls a judge's work and working conditions. Each has given rise to allegations of improper carrot/stick pressuring of administrative law judges. 45/

The basic need for an independent Corps stems from the fundamentally independent, judicial nature of the administrative law judge function. The same independence of function was recognized in another context years ago, when the administration of the federal court system was removed from the Department of Justice.

It cannot be overemphasized that the proper function of the administrative law judge is not, and should not be, that of a policymaker or a team player. The function should not be obfuscated by labeling it as "quasi-judicial." The essence of this function in modern day administrative adjudication is that of a judge; nothing more and nothing less. Impartial factfinding which requires the application of laws, court interpretations, and articulated congressional and agency policy is a judicial function. The independence essential to the function should be guaranteed by the physical and administrative separation needed to ensure and demonstrate the integrity of the administrative process.

Agencies may assert that the administrative judiciary should not be independent because the administrative process as a whole is an agency matter. This position, however, ignores the fact that administrative law judges are -- plainly and simply -- judging controversies to which the agency in most instances is a party. Thus, if due process is to be achieved, the rulings and decisions by administrative law judges while, of course, subject to agency and court review on-the-record, must be independent of outside-the-record influence or control by the agency.

Indeed, unless overwhelming economic savings were to be demonstrated favoring the status quo, which is not the case, it would appear that no argument exists for the present system of agency housing of administrative law judges. The principal result of maintaining such a system is the perpetuation of agency potential to influence the judges by outside-the-record considerations. Since, however, the economic balance of costs would plainly favor central housing and administration of the administrative judiciary, a fair -- and vital -- question must be raised as to why the existing system is not changed to ensure the independence of the function of the administrative law judge.

The organization of administrative law judges as a single Corps whose services are available to all administrative agencies for the conduct of hearings under the APA is a logical step in the evolution of the administrative law process and one which has many attendant benefits in terms of cost savings, efficient employment of judges, and the strengthening of integrity and the effectiveness of government programs.

The funding of all administrative law judge functions through one organization would create major savings of resources while giving the Congress, the provider of these resources, a far greater assurance that the administrative law judges are fully and properly employed and that the program results of their actions will be in a form susceptible to effective Congressional oversight, review by the courts and evaluation by the public.

At present, each agency has its own judges even though the judges are qualified to provide judicial services for other agencies. 46/ Under elaborate procedures for the selection and qualification of administrative law judges, the Office of Personnel Management develops an official list, or register, of judicial applicants eligible for selection by the agencies. Since the requirements for placement on the register are principally the same for all agencies, 47/ it is clear that the administrative law judges are all basically qualified to serve any agency. The benefits of their expertise and familiarity with the work of certain agencies can be effectively preserved by assigning them to appropriate divisions within the Corps. We believe that the structure proposed by S. 673 will both preserve expertise while protecting necessary judicial independence.

VI. The States Provide Precedents

A unified corps of federal administrative law judges finds precedent in state governments. 48/

In Maine, an Administrative Court has been established having jurisdiction over licensing cases. The licensing agency appears as a party before the Maine Administrataive Court and its decisions are subject to review only by a higher court.

Eleven other States have established central panel systems, namely: California, Colorado, Florida, Massachusetts, Minnesota, Missouri, New Jersey, Tennessee, Washington, North Carolina, and Wisconsin. Under the central panel system, administrative law judges are assigned to a single, central panel that provides trial services to various agencies as needed. Substantial cost savings and efficiencies have been achieved in each of these states and compelling statistical evidence has been compiled and published by the States of Minnesota and New Jersey. More importantly, each State has witnessed improved public perception of administrative law judges as members of a truly independent administrative judiciary.

The central panel system is incorporated as part of the Model State Administrative Procedure Act, as revised in 1981, and a growing number of states are now actively considering its adoption. During the past two years, the following 16 States have either made a proposal to their legislatures to establish a central panel system, or are in the process of studying the concept: Alaska, Arizona, Georgia, Illinois, Indiana, Maryland, Michigan, Nebraska, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Virginia and Wyoming.

VII. Analysis of the Bill

A. The Structure of the Corps and the Appointment Process

S. 673 provides for the management of the Corps by a Council consisting of the Chief Judge and Chiefs of specialized divisions. They would be the only political appointees, and only the initial division chiefs would be by Presidential appointment; subsequent vacancies would be filled by the Council itself.

All administrative law judges presently employed by individual agencies would automatically become members of the Corps upon enactment of either bill. Future administrative law judges would continue to be tested and screened by OPM and the Council would be required to fill vacancies from among the best five candidates certified as qualified by OPM. The list of eligibles available for selection would be expanded from the best three to the best five candidates certified by OPM to increase opportunities for women and minority candidates who are less likely to be entitled to veteran's preference.

The Chief Judge would be appointed for a five-year term by the President by and with the advice and consent of the Senate. The integrity of the merit system is maintained by requiring the candidate to be an administrative law judge for at least five years preceeding appointment.

S. 673 provides that the Presidential appointments of the Chief Judge, and, as applicable, the Division Chiefs would be from lists provided by a Judicial Nomination Commission, consisting of five members, with each of the following selecting one member: The Chief Judge of the United States Court of Appeals for the District of Columbia Circuit; the Chief Judge of the United States District Court for the District of Columbia; the Chairman of the Administrative Conference of the United States; the President of the American Bar Association; and the President of the National Bar Association, Incorporated.

The Corps would be divided into divisions in keeping with the major specialties of Administrative Law. Each division would be headed by a Division Chief Judge who must possess experience and expertise in the division's field of adjudication and would be nominated by the Judicial Nomination Commission for presidential appointment. The bill authorizes the Council of the Corps to establish as many as 10 and no less than 4 divisions.

Under S. 673, the Corps would initially have seven divisions conducting hearings for the various federal agencies and Executive Departments as follows:

1. Division of Communications, Public Utility and Transportation Regulation

   Federal Communications Commission, Federal Energy Regulatory Commission, Interstate Commerce Commission, Department of Transportation, Federal Maritime Commission, Nuclear Regulatory Commission

2. Division of Health, Safety and Environmental Regulation

Occupational Safety and Health Review Commission, Federal Mine Safety and Health Review Commission, National Transportation Safety Board, Environmental Protection Agency, Department of the Interior, Department of Commerce

3. Division of Labor

   Department of Labor

4. Division of Labor Relations

   National Labor Relations Board, Federal Labor Relations Authority

5. Division of Benefits Programs

   Social Security Administration, Health and Human Services

6. Division of Securities, Commodities and Trade Regulation

   Department of Agriculture, Federal Trade Commission, Commodity Futures Trading Commission, Securities and Exchange Commission, International Trade Commission

7. Division of General Programs

   Drug Enforcement Administration, Department of Housing and Urban Development, Food and Drug Administration, Small Business Administration, U. S. Postal Service Department, Merit Systems Protection Board, Coast Guard, and the cases of all other Executive Departments and agencies not specifically assigned to any of the other divisions.

B. Removal, Suspension, Discipline and Pay

The bill provides that a judge may be removed, suspended, reprimanded or disciplined for misconduct, incompetence, or neglect of duty only, and may also be removed or suspended for physical or mental disability.

The bill creates a new effective procedure for taking action on complaints against judges. Such complaints would be initially considered by a Complaints Resolution Board. This procedure tracks systems which have been implemented for the discipline of federal judges and magistrates pursuant to the "Judicial Councils Reform and Judicial Conduct and Disability Act of 1980."

We would clarify the terms "misconduct" and "physical disability" as used in § 569 of the bill by including as part of the bill's legislative history the following statements:

> (a) "misconduct" is used in the sense of "unlawful conduct by an official in regard to his office." See The Random House College Dictionary, page 865; and
>
> (b) "physical . . . disability" refers to a disability that substantially interferes with the performance of duties.

We would also recommend that upon enactment, the Corps and the Merit Systems Protection Board look to ways to avoid conflicts-in-interest that may arise when a disciplinary complaint against a judge is referred by MSPB to another judge for hearing. One solution would be to maintain a register of retired judges and refer such complaints to a three-judge panel which includes retired judges. Retired judges might also hear those complaints under the Federal Labor Relations Act which are brought against the Corps itself by unionized Corps employees.

The bill provides for uniform pay for all ALJs, at the pay level now applicable to senior ALJs employed by the various regulatory agencies. The existence of more than one pay grade has in the past hampered efforts to effectively assign cases in the most efficient manner among ALJs. Elimination of this barrier is needed to assure that the Corps will have maximum flexibility when making case assignments. However, in order to eliminate any misapprehension respecting our intentions, we would not object to a modification of the bill which would accomplish this without increase or decrease of the salaries payable under existing provisions for ALJ compensation.

C. Jurisdiction

Judges would continue to hear rulemaking proceedings and adjudications over which the Administrative Procedure Act presently gives them jurisdiction. In addition, the bill authorizes the Corps to accept any other type of case from any federal agency or court desiring to make a decision on a record developed at a hearing conducted by an administrative law judge.

This will give the administrative process a needed flexibility it presently lacks. It will enable experimentation not requiring the creation of new legal entities each time a new type of adjudicative hearing may be required or desired.

Federal courts may now, and have, on occasion, referred specific fact-finding missions to federal administrative law judges who perform that function as special masters. Section 568(d) of the bill specifically identifies this ALJ capacity and should promote such referrals in the future.

D. Study and Report on Agency Review

Section 3 of the bill contains a specific direction to the Corps' Chief Judge to study and report on the types and levels of agency review to which the decisions by each division's ALJs shall be subject. We believe that such a study and report is needed and should be specifically required.

Past studies have shown that administrative delays have been caused by agency assignment of review power to intermediate review boards; the use of interlocutory appeals; de novo review of facts; and multilayer review processes. The extent to which such practices will continue or ensue will need to be investigated. In addition, comparisons will have to be made to evaluate the benefits that accrue to those agencies which give ALJ decisions greater finality.

VIII. Conclusion

We believe the previous discussion demonstrates compelling reasons and persuasive precedents for the establishment of a unified corps of federal administrative law judges. The chief advantages of an ALJ Corps as envisioned by the bill may be summarized as follows:

1. Improved public perception of the fairness of the administrative process. This would be achieved through full compliance with the requirement that those conducting adjudications must be truly independent and free from any association or personal obligation to any party, in order that every party be afforded due process.

2. Significant cost savings.

3. More efficient and flexible use of the administrative law judges presently employed by 29 separate agencies and departments.

4. Establishment of a Complaints Resolution Board to better assure that administrative law judges are held accountable for their actions and conduct.

5. Preservation of the merit selection system.

6. Retention and enhancement of the expertise possessed by administrative law judges.

7. Increased and better identified availability of administrative law judges to assist all agencies and federal courts upon specific request.

IX. Footnotes

1. See Attachments A and B. Attachment A was prepared by the Office of Administrative Law Judges, Office of Personnel Management, showing, as of January 27, 1986, the distribution of administrative law judges by grade and agency. Attachment B is a table originally compiled by Jeffrey S. Lubbers, Research Director, Administrative Conference of the United States (ACUS), which was published in 65 Judicature 268 (1981), to which the current data for January 1986 has been added.

2. See, e.g., "The Role of the Administrative Law Judge in the Title II Social Security Disability Insurance Program," a report of October 1983, by the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs of the United States Senate. S.Prt. 98-111, 98th Cong., 1st Sess. Based on the hearing the Subcommittee conducted on this issue, its Chairman, Senator William S. Cohen and Ranking Minority Member, Senator Carl Levin, reported: "The Subcommittee's principal finding is that the SSA is pressuring its ALJs to reduce the rate at which they allow disabled persons to participate in or continue to participate in the Social Security disability program. (The SSA has been successful in its efforts as evidenced by recent statistics showing a dramatic decline in the administrative law judge allowance rate in the past year and a half from 67.2 percent in mid-1982, to 51.9 percent in June 1983). The Subcommittee also finds that the SSA is imposing this pressure through several means including the inequitable and unjustified targeting of only allowance decisions and high allowance judges for review pursuant to an amendment sponsored by Senator Henry Bellmon and pased in 1980 (Bellmon Review), and the use of minimum production quotas and productivity goals." Id. at III.

3. Gulan v. Heckler, 583 F.Supp. 1010, 1017-18 (N.D. Ill. 1984, in which the District Court stated: "The ALJ's performance falls far short of the level of objective and fair justice that judges in the United States are expected to achieve. The reasons for these apparently frequent unjudicial performances by HEW Administrative Law Judges are not clear although there have been

suggestions that they are the result of pressures brought to bear on them by executives in the department for political and fiscal reasons. If this is the case, it should stop. There is no room in our system of justice for Nazi or Soviet-type misuse and abuse of judges and no ALJ should be exposed or succumb to such pressure."

4. See Comptroller General's Report to the Congress, "Administrative Process: Better Management Is Needed," FPCD-78-25 (May 15, 1978) (GAO Report 1978); Comptroller General's Report to the Congress, "Management Improvements In The Administrative Law Process: Much Remains to be Done," FPCD-79-44 (May 23, 1979) (GAO Report 1979). The reports were responsive to a request by Congressman John Moss for a study by the General Accounting Office pursuant to its authority under the Budget and Accounting Act of 1921, 31 U.S.C. §§ 712, 718, 719 (1982) (amending 33 U.S.C. § 53 (1976)) and the Legislature Reorganization Act of 1970, Pub. L. No. 91-510, 84 Stat. 1140 (1970).

5. See, discussion under the heading, "The States Provide Precedents", infra, at 30.

6. See Report of the State of New Jersey Governor's Committee on the Office of Administrative Law (1984), at page 8. See also, "A Report on The First Decade: 1975-1985" by the Office of Administrative Hearings, the State of Minnesota (Jan. 1986).

7. Memorandum of November 6, 1984 by Jeffrey Lubbers, Research Director, ACUS, on Meeting of State ALJ Central Panel Directors.

8. American Bar Association Journal, November 1976, Volume 62, pp. 1425-1428, at 1426.

9. See Scalia, "The Hearing Examiners Loan Program," 1971 Duke L.J. 319, 360 (1971) in which Judge Scalia concludes that a corps of ALJs is needed for loan purposes because "the only means of assuring an adequate supply of examiners (ALJs) for loan work is to employ examiners (ALJs) for that very purpose."

10. See Attachment B.

11. L. Jaffe, "Judicial Control of Administrative Actions" at 114 (1965).

12. 1 C.F.R. § 305.72-6.

13. Ibid.

14. Ibid.

15. Ibid. See 5 U.S.C. §§ 551-559; 701-706.

16. Atlas Roofing Co. v. Occupational Safety Commission, 430 U.S. 442.

17. 1 C.F.R. § 8305.79-3. Acceptance of the 1972 ACUS recommendation is exemplified by the 1982 enactment of H.R. 6679; empowering the Secretary of Agriculture to administratively assess civil penalties "after notice and opportunity for an agency hearing on the record" in enforcement of nine separate statutes controlling the introduction of plant, livestock and poultry diseases to the United States. And see Final Report to ACUS, May 1979, "The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies" by Professor Colin S. Diver, Boston University School of Law, which reported that by 1979, there were 348 statutory civil penalties, of which 141 were directly assessed by federal Departments and agencies.

18. For a discussion on the proper limits of agency discretion, see Wright, Beyond Discretionary Justice, 81 Yale L.J. 575, 590-591 (1972).

19. See Attachment B.

20. All of the statistics pertaining to HHS are taken from its published Operational Reports.

21. See Stieberger, et al. v. Heckler, _____ F.Supp. _____, (D.C. S.D. N.Y.) 84 CIV 1302, 8-19-85, reported in CCH "Unemployment Insurance Reports," pp. 2399-79 through 2454 (1985 edition). See also the Subcommittee report cited in footnote 2, supra.

22. This form of review became known as "Bellmon Review," since it was purportedly responsive to a direction by Congressman Bellmon.

23. See Cofer, "Judges, Bureaucrats, and the Question of Independence: A Study of the Social Security Administration Hearing Process", Greenwood Press. Professor Cofer conducted a comprehensive survey of the ALJs at SSA in which 70% of those who responded to her questionnaire affirmed that: "Tacit agency pressure is placed upon SSA ALJs to hand down fewer 'reversals' during times of national governmental economic retrenchment."

24. Association of Administrative Law Judges, Inc. v. Margaret M. Heckler, et al. 594 F.Supp. 1132 (D.D.C. 1984).

25. Id. at 1142.

26. Id. at 1143.

27. Price, "The Question of Independence Continues: Administrative Law Judges Within the Social Security Administration," 64 Judicature 228, at 233 (Dec. - Jan. 1986). See also Stieberger, supra, footnote 21.

28. Id. at 233.

29. OPM employed this phrase in its memorandum of February 9, 1983, which it circulated among Chief ALJs and agency heads.

30. Morse, "The Administrative Law Judge - A New Direction For The Corps?" 30 Fed. Bar News & Journal, 398, 399 (1983).

31. As to the limitations on voluntary loan programs and the need for a corps of unattached judges to conduct hearings for multiple agencies, see the Duke Law Review article by Scalia, supra, footnote 9.

32. United States Civil Service Commission: Report of the Committee on the Study of the Utilization of Administrative Law Judges, at 66-67, July 30, 1974.

33. Id. at 45, 63.

34. Administrative Law Judge Corps Act: Hearings on S. 1275 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. 264 (1983).

35. Id.

36. See reports cited in footnote 4, supra.

37. *Id*. GAO Report 1978, at Digest ii-iii.

38. *Id*. at iiv and v.

39. *Id*. at 44.

40 *Id*. GAO Report 1979, at 1-3.

41. *Id*.

42. "A New Regulatory Framework, Report on Selected Independent Regulatory Agencies," by the President's Advisory Council on Executive Organization, January 1971.

43. *Levinson*, *The central panel system: a framework that separates ALJs from administrative agencies*, 65 Judiciature 236 (1981); *Lubbers, Federal Administrative Law Judges: a Focus on Our Invisible Judiciary*, 33 Ad.L.Rev. 109 (1981); *Lubbers, A unified corps of ALJs: a proposal to test the idea at the federal level*, 65 Judicature 266 (1981); *Marquardt and Wheat; The Developing Concept of an Administrative Court*, 33 Ad.L.Rev. 301 (1981); *Levinson, The Proposed Administrative Law Judge Corps: An Incomplete But Important Reform Effort*, 19 New Eng.L.Rev. 733 (1984); *Kauper*, *Protecting the Independence of Administrative Law Judges: A Model Administrative Law Judge Corps Statute*, 18 U. of Mich. J. of Law Ref. 537 (1985). *See also* the articles cited in footnote 45, *infra*, and the two articles that are attached.

44. *See* the discussion under the heading "The States Provide Precedents", *infra*, at 30.

45. *See* *Levant*, "Unified Corps of Administrative Law Judges - The Transition From a Concept to An Eventual Reality," 6 W.New Eng.L.Rev. 705, 717-714, (1984) and *Palmer and Bernstein*, "Establishing Federal Administrative Law Judges as an Independent Corps: The Heflin Bill," 6 W.New Eng.L.Rev. 673, 693-698 (1984).

46. *See* Attachment C, an SSA memorandum, which lists the wide variety of cases to which ALJs at SSA have been detailed on voluntary loan programs from October 15, 1983 through June 28, 1985.

47. Excepting the "selective" register which has fallen into disuse by most agencies and which we believe should be abolished to attract the best candidates from the ranks of private practice as well as government service.

48. *See* the November 1981 edition of Judicature, "The Central Panel System: A New Framework for the Use of Administrative Law Judges; and, in particular, *Levinson*, *The Central Panel System: A Framework that Separates Administrative Law Judges from Administrative Agencies*, 65 Judicature 236. *See also* Rich and Brucar, "The Central Panel System for Administrative Law Judges: A Survey of Seven States" (Frederick, Md., University Publications of America, 1983), and the reports by the States of New Jersey and Minnesota, *supra*, footnote 6.

X. *Attachments**

A. Total Number of ALJs By Grade and Agency
as of January 27, 1896.

B. Changes in the Distribution of Administrative
Law Judges: 1947 to 1982.

C. SSA memorandum on the number of its ALJs detailed to other agencies from October 15, 1983 to June 28, 1985.

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* Also attached are reprints of the following law review articles:

a) Palmer and Bernstein, "Establishing Federal Administrative Law Judges as an Independent Corps: The Heflin Bill," 6 W.New Eng.L.Rev. 673-704 (1984);

b) Palmer, "The Evolving Role of Administrative Law Judges," 19 New.Eng.L.Rev. 755-810 (1984).

ATTACHMENT
"A"

TOTAL NUMBER OF ALJs ON BOARD BY GRADE AND AGENCY
as of January 27, 1986

Breakdown by grade:

GS-15:	728
GS-16:	296
GS-17:	10
	1,034

Breakdown by agency:*

	GS-15	GS-16	GS-17
Agriculture		5	
Coast Guard	10	1	
Commerce	1	1	
Commodity Futures Trading Commission		4	
Drug Enforcement Administration		1	
Environmental Protection Agency		7	
Federal Communications Commission		10	1
Federal Energy Regulatory Commission		20	1
Federal Labor Relations Authority		9	1
Federal Maritime Commission		5	
Federal Mine Safety and Health Review Commission		9	1
Federal Trade Commission		5	1
Food and Drug Administration		[illegible]	
Health and Human Services	1		
Housing and Urban Development	1		
Interior		7	
International Trade Commission		4	
Interstate Commerce Commission		3	1
Labor	20	65	1
Merit Systems Protection Board		1	
National Labor Relations Board		101	1
National Transportation Safety Board		5	
Nuclear Regulatory Commission		2	
Occupational Safety and Health Review Commission		16	1
Postal Service		3	
Securities and Exchange Commission		4	1
Small Business Administration		1	
Social Security Administration	695	1	
Transportation		4	
	728	296	10

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*Agency identification reflects permanent assignments, and omits loans and unoccupied slots.

ATTACHMENT "B"

Changes in the Distribution of Administrative Law Judges: 1947 to 1986

	June 1947	June 1954	July 1962	Feb. 1974	Jan. 1979	Jan. 1980	June 1981	Jan. 1986
Economic regulatory agencies 1/	125 (63.8%)	165 (59.4%)	221 (44.7%)	153 (19.3%)	157 (14.7%)	142 (12.4%)	109 (9.7%)	69 (6.7%)
Labor-related agencies 2/	35 (17.9%)	49 (17.6%)	74 (15.0%)	143 (18.1%)	210 (19.6%)	257 (22.4%)	266 (23.8%)	226 (21.9%)
Social Security Administration	13 (6.6%)	20 (7.2%)	164 (33.2%)	431 (54.4%)	660 (61.7%)	698 (60.9%)	695 (62.1%)	696 (67.3%)
Other agencies	23 (11.7%)	44 (15.8%)	35 (7.1%)	65 (8.2%)	43 (4.0%)	49 (4.3%)	49 (4.4%)	43 (4.2%)
TOTALS	196	278	494	792	1070	1146	1119	1034

1/ Transportation, CFTC, CPSC, EPA, FCC, FDA, FERC, FTC, ICC, ITC, SEC, NRC, and predecessor agencies.

2/ NLRB, Labor, OSHRC, FMSHRC, FLRA.

Source: This table was originally compiled by Jeffrey S. Lubbers, Senior Staff Attorney, Office of the Chairman of the Administrative Conference of the United States, and appeared in 65 Judicature 268. The data for January 1986 has been added.

ATTACHMENT "C"

Curtiss

6/28/85

Judge Brown

From 10/15/83 to the present, OHA has detailed a total of 177 ALJs to other agencies. This figure refers to the number of judges detailed only. The number of cases is much higher, Breakdown is as follows:

FDIC	55
Comptroller of Currency	49
Department of Labor	19
Department of Education	19
Federal Reserve	9
Federal Home Loan Bank Board	6
Department of Treasury	6
Department of Transporation	3
Civil Rights Review Authority	2
Consumer Product Safety Commission	2
National Credit Union Association	2
Army Corps	1
National Labor Relations Board	1
Inter-Trade Commission	1
Department of Commerce	1
Commodity Futures Trade Commission	1

Curtiss Belcher

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ESTABLISHING FEDERAL ADMINISTRATIVE LAW JUDGES AS AN INDEPENDENT CORPS: THE HEFLIN BILL

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EDWIN S. BERNSTEIN

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ESTABLISHING FEDERAL ADMINISTRATIVE LAW JUDGES AS AN INDEPENDENT CORPS: THE HEFLIN BILL

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EDWIN S. BERNSTEIN**

I. INTRODUCTION

At the annual banquet of the Federal Administrative Law Judges Conference on May 14, 1983, Senator Howell Heflin announced that two days earlier he had introduced a bill to establish administrative law judges as an independent, unified corps. The Senator discussed the importance of the administrative judiciary and the need for its functions to be performed in an independent atmosphere, free of bias, in order to assure fairness and give credence to its decisions. Senator Heflin stressed that "these judicial officers must be free from any association or personal obligation to any party or agency in order that every litigant to the process be afforded fairness and due process. The mere appearance of bias and prejudice smacks at the vital concept of fairness and due process."[1]

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[1] Address of Senator Heflin, Federal Administrative Law Judges Conference Annual Banquet in Washington, D.C. (May 14, 1983). *See also* 129 CONG. REC. S6610-11 (daily ed. May 12, 1983) (statement of Sen. Heflin). "Agency" as used by Senator Heflin

Senator Heflin noted that the use of similar systems in several States had resulted in substantial savings and efficiencies that he expected the federal government would experience once his bill, Senate bill 1275[2] was enacted.[3]

This article will describe the status of administrative law judges in the federal government; analyze Senate bill 1275; review the testimony before the Subcommittee on Administrative Practice and Procedure, Senate Judiciary Committee; and evaluate the arguments in support of and in opposition to Senator Heflin's bill.

II. The Present Status of Federal Administrative Law Judges

There are 1,134 administrative law judges serving in the federal government today.[4] They hear and decide cases that "permeate every sphere and almost every activity of our national life [and] have a profound effect upon the direction of our economic growth."[5]

Professor Kenneth Culp Davis estimates that the use of administrative judges began in 1789 with the appointment of officers to determine which soldiers were "disabled during the late war" and customs officers who were authorized to "estimate the duties payable" on imports.[6]

But 1946 is the true year of birth for today's federal administrative law judge. That is the year the Administrative Procedure Act (APA) was enacted.[7]

Under the APA, administrative law judges presently hold career appointments pursuant to a system of merit selection.[8] They are the only government officers, apart from certain agency heads or officials who are provided for specially under other specific statutes, who may conduct rulemaking and adjudicative hearings when agency ac-

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and by the authors, includes executive departments. This is consistent with the definition of "agency" in the Administrative Procedure Act. 5 U.S.C. § 551(1) (1982).

[2] S. 1275, 98th Cong., 1st Sess. (1983).

[3] 129 Cong. Rec. S6610 (daily ed. May 12, 1983) (statement of Sen. Heflin).

[4] Office of Personnel Management, Total Number of ALJs on Board by Grade and Agency as of November 21, 1983.

[5] Message of President John F. Kennedy, H.R. Doc. No. 135, 57th Cong., 1st Sess. 1-2 (1961), *quoted in* Macy, *The APA and the Hearing Examiner: Products of a Viable Political Society*, 27 Fed. B.J. 351, 353 (1967).

[6] 3 K.C. Davis, Administrative Law Treatise § 17.11, at 313 (2d ed. 1978).

[7] Administrative Procedure Act of 1946, ch. 324, 60 Stat. 237 (current version at 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 6362, 7562 (1982)).

[8] Administrative Conference of the U. S., Federal Administrative Law Judge Hearings Status Report for 1976-1978, at 9-13 (1980).

tion is based on substantial evidence of record. Their functions have been held to be "functionally comparable"[9] to those of trial judges which entitles them to absolute immunity from liability arising out of their judicial acts.[10]

The APA was enacted in response to charges that "the practice of creating independent regulatory commissions, who perform administrative work in addition to judicial work, threatens to develop a 'fourth branch' of the Government for which there is no sanction in the Constitution."[11]

The change in the status of administrative law judges[12] effectuated by the APA, was first reviewed by the Supreme Court in *Ramspeck v. Federal Trial Examiners Conference*.[13] In that case the Supreme Court traced the history of these Article I officers and the

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[9] Butz v. Economou, 438 U.S. 478, 513 (1978).

[10] *Id.* at 516.

[11] S. Doc. No. 248, 79th Cong., 2d Sess. (1937), *reprinted in* LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT OF 1946, at 189 (1946).

[12] In 1978, the APA was amended to substitute the title "Administrative Law Judge" for the earlier designation "Hearing Examiner." Act of March 27, 1978, Pub. L. No. 95-251, §§ 2, 3, 92 Stat. 183, 183-84.

[13] 345 U.S. 128 (1953).

> Prior to the passage of the Administrative Procedure Act, hearing examiners' tenure and status were governed by the Classification Act of 1923, as amended. Under the Classification Act, as employees of an agency, their classification was determined by the ratings given them by the agency, and their compensation and promotion depended upon their classification. The examiners were in a dependent status.
>
> With the rapid growth of administrative law [their] role. . .became increasingly significant and controversial. . . .
>
> Many complaints were voiced against the actions of the hearing examiners, it being charged that they were mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations. A study by President Roosevelt's Committee on Administrative Management resulted in a report in 1937 recommending separation of adjudicatory functions and personnel from investigative and prosecution personnel in the agencies. The Attorney General's Committee on Administrative Procedure was appointed in 1939 to study the decisional process in administrative agencies, and the final report of this Committee was published in 1941. Both the majority and minority members of the Committee recommended that hearing examiners be made partially independent of the agency by which they were employed; the majority recommended hearing examiners be appointed for a term of seven years and the minority recommended a term of twelve years. Although extensive hearings were held on bills to carry out the recommendations of this Committee, World War II delayed final congressional action on this subject. After the war, the McCarron-Sumners Bill, which became the Administrative Procedure Act, was introduced. The Senate Judiciary Print of June 1945 reveals that at that time there was still great diversity of opinion as to how the status of hearing examiners should be enhanced. Several proposals were considered, and in the final bill Congress provided that hearing examiners

controversial nature of their positions. The APA's legislative history demonstrates that there had been much stronger support for the creation of a fully, independent administrative judiciary than that indicated by the majority opinion in *Ramspeck*.[14] The final report of the Attorney General's Committee, for example, contains an express recommendation by the minority members for complete separation of the adjudicative function in cases involving agency prosecution of complaints against private parties:

> Hearing and deciding officers cannot be wholly independent so long as their appointments, assignments, personnel records, and reputations are subject to control by an authority which is also engaged in investigating and prosecuting. Of course, this dependence may be diminished by various devices, as the Committee has very rightly attempted. We think it clear, however, that such dependents (sic) cannot be eliminated by measures short of complete segregation into independent agencies.[15]

Concern over administrative impartiality antedating the 1946 enactment of the APA had led to earlier congressional responses. In 1939, Senator Norris introduced a bill to create a separate administrative court.[16] A succession of bills offering various remedies were introduced in Congress between 1933 and 1946;[17] and, during the interim between the appointment of the Attorney General's Committee pursuant to the directions of President Roosevelt, and the issuance of its formal report, Congress actually passed one of them—the Walter-Logan bill.[18] It was vetoed by President Roosevelt on December 18, 1940, and the veto was sustained by the House. When this event was later discussed by Justice Jackson in *Wong Yang Sung v. McGrath*,[19] however, he concluded that though the President vetoed the bill, he recognized the need for reform.[20] Justice Jackson

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should be given independence and tenure within the existing Civil Service system.

Id. at 130-32.

[14] S. DOC. NO. 248, 79th Cong., 2d Sess. (1937), *reprinted in* LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT OF 1946, at 41-42 (1946).

[15] ATT'Y GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOV'T AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. 203-09 (1941).

[16] S. 5154, 70th Cong., 2d Sess. (1939).

[17] S. 1835, 73d Cong., 1st Sess. (1933); S. 3787, H.R. 1297, 74th Cong., 2d Sess. (1936); S. 3676, 75th Cong., 3d Sess. (1938); H.R. 6324, H.R. 4235, H.R. 4236, S. 915, S. 916, 76th Cong., 1st Sess. (1939); S. 674, S. 675, S. 918, H.R. 3464, H.R. 4238, H.R. 4782, 77th Cong., 1st Sess. (1941); H.R. 1203, S. 7, 79th Cong., 1st Sess. (1945).

[18] S. 915, H.R. 6324, 76th Cong., 1st Sess. (1939).

[19] 339 U.S. 33 (1950).

[20] *Id*. at 39.

said of the APA itself: "The Act thus represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest. It contains many compromises and generalities and, no doubt, some ambiguities. Experience may reveal defects. . . ."[21]

The alternatives before Congress and the methodology selected to secure the independence of the administrative judiciary is described in the legislative history of the APA, as follows:

> The purpose of this section is to render examiners independent and secure in their tenure and compensation. The section (section 11 of the APA) thus takes a different ground than the present situation in which examiners are mere employees of an agency, and other proposals for a completely separate "examiners' pool" from which agencies might draw for hearing officers. Recognizing that the entire tradition of the Civil Service is directed toward security of tenure, it seems wise to put that tradition to use in the present case. However, additional powers are conferred upon the Commission.[22]

When the Supreme Court, in *Butz v. Economou*[23] held administrative law judges to be "functionally comparable" to trial judges, it stressed that they resolve conflicts of an adversarial nature "every bit as fractious as those which come to court," and have comparable powers to issue subpoenas, rule on proffers of evidence, regulate the course of hearings, and make or recommend decisions.[24] The opinion went on to list the APA's provisions designed to guarantee the independence of administrative law judges: The Office of Personnel Management and the appointing agency-employer controls their pay; cases must be assigned to them in rotation so far as practicable; no party may consult with them *ex parte* concerning a fact at issue in a hearing; they may not be responsible to, supervised by, or directed by agency agents or personnel performing investigative or prosecution functions; they may not perform duties inconsistent with their duties as administrative law judges; and they may be removed only for good cause established and determined by the Merit System Protection Board after a hearing on the record.[25]

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[21] *Id.* at 40-41.

> Of the several administrative evils sought to be cured or minimized, only two are particularly relevant to issues before us today. One purpose was to introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies whose customs had departed widely from each other. . . .
>
> More fundamental, however, was the purpose to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge.

Id.

[22] S. Doc. No. 248, 79th Cong. 2d Sess. (1937), *reprinted in* LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT OF 1946, at 215 (1946).

[23] 438 U.S. 478 (1978).

[24] *Id.* at 512-13.

But the insulation from agency pressures that the APA affords administrative law judges is far from complete. The Supreme Court in its earlier decision in *Ramspeck*, upheld the right of the Civil Service Commission[26] to classify " the examiners into grades, with salaries appropriate to each grade, . . . in each federal agency using examiners. This classification ranged from just one grade in several agencies to five grades in two agencies."[27] The majority conceded that the Commission had employed wholly subjective specifications when it classified the grades as "moderately difficult and important," "difficult and important," "unusually difficult and important," "exceedingly difficult and important," and "exceptionally difficult and important."[28] Nevertheless, the majority upheld this practice under which the employing "agency shall decide if there is a vacancy to be filled, and further that the agency shall decide if this vacancy is to be filled by promotion from among the present examiners."[29]

The majority opinion next interpreted the APA's requirement that "examiners shall be assigned to cases in rotation *so far as practicable*."[30] The majority believed that this did not require *mechanical* rotation, but permitted assignments to be made on the basis of "the experience and ability of the examiner available."[31]

Finally, the majority held that an agency may dispense with the services of administrative law judges "for lack of funds, personnel ceilings, reorganizations, decrease of work and similar reasons" through "reductions-in-force," under which judges holding the lowest number of "retention credits" may be removed from office "for good cause" within the meaning of the APA.[32]

Justice Black, with whom Justices Frankfurter and Douglas concurred, vigorously disagreed with the *Ramspeck* majority opinion:

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[25] *Id.*; *see also* 5 U.S.C. §§ 554(d), 3105, 7521 (1982).

[26] The Civil Service Commission was the predecessor of the Office of Personnel Management and the Merit Systems Protection board.

[27] *Ramspeck*, 345 U.S. at 135.

[28] *Id.* at 136-37.

[29] *Id.* at 138.

[30] *Id.* at 139 (emphasis in original).

[31] *Id.* at 139-40.

[32] *Id.* at 142-43.

> I agree with the District Court and the Court of Appeals that the regulations here sustained go a long way toward frustrating the purposes of Congress to give examiners independence. . . . The distinctions depended upon to support the different classifications are so nebulous that the head of an agency is left practically free to select any examiner he chooses for any case he chooses. . . . And administrative agencies are permitted to attribute choice of a particular examiner for a particular case to considerations whether "complex legal, economic, financial or technical questions or matters" are merely "moderately complex," "fairly complex," "extremely complex," "exceptionally complex," or just "complex." I think all these conceptualistic distinctions mean is that the congressional command for a nonagency controlled rotation of cases is buried under words.[33]

But, the *Ramspeck* majority is still the controlling interpretation of the actual parameters of protection from agency pressures that the APA provides to administrative law judges. Those who argue that the APA's protections are so all-embracing that there is no need to completely separate administrative law judges from their present agency employers, necessarily ignore *Ramspeck*. They ignore concerns embodied in calls for the establishment of an administrative court by the recommendations of the Second Hoover Commission in 1955,[34] the Ash Council in 1971,[35] and then Solicitor General Robert H. Bork in 1977.[36] They also overlook the 1974 report of the La Macchia Committee which stopped short of recommending anew the formation of an administrative court and opted instead for the establishment of a "unified corps."[37]

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[33] *Id.* at 144-45 (Black, J., dissenting) (footnotes omitted).

[34] Comm'n on Organization of the Executive Branch of the Government, 84th Cong., 1st Sess., Report to the Congress Vol. VI, at 84 (1955). The recommended court would have consisted of three sections: Tax (which would involve transferring this function from the Executive to the Judicial Branch); Labor (replacing the NLRB); and Trade (replacing the FTC and certain other regulatory agencies). Hearing Examiners would have been replaced by Hearing Commissioners serving as the Court's trial division. *Id.*

[35] President's Advisory Council on Executive Organization, A New Regulatory Framework 53 (1971). This proposed an administrative court having jurisdiction over appeals from transportation, securities, and power agencies. *Id.*

[36] Dep't of Justice Comm. on Revision of the Federal Judicial System, The Needs of the Federal Courts (1977). The Bork Committee proposed that non-Article III tribunals be created which "could consist of an Article I trial division. . .and an administrative court of appeals. The trial division could serve the function now served by administrative law judges. . . ." *Id.* at 7-11.

[37] United States Civil Service Comm'n, Report of the Comm. on the

It is this latter recommendation which the Heflin Bill would implement.

III. THE HEFLIN BILL: ITS PURPOSE AND PROVISIONS

The essential purpose of the Heflin bill is to remove administrative law judges from the supervision and control of the agencies where they are presently employed, and establish them instead, as an independent, unified corps.[38]

The Corps would initially be divided into seven divisions in keeping with present, major specialties of administrative law.[39] Each division would be headed by a division chief judge required by the bill to be an expert in the division's field of adjudication, demonstrated by having at least five years of experience as an administrative law judge assigned to cases of the type to be handled by the division.[40] The division chiefs, together with the chief judge of the

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STUDY OF THE UTILIZATION OF ADMINISTRATIVE LAW JUDGES (LAMACCHIA COMM'N REPORT) 46 (1974).

[38] 129 CONG. REC. S6609-10 (daily ed. May 12, 1983) (statement of Sen. Heflin).

[39] S. 1275, 98th Cong. 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 564(b)). These divisions would be organized in the following manner:

1. *Division of Communication, Public Utility and Transportation Regulation*
Federal Communications Commission, Federal Energy Regulatory Commission, Interstate Commerce Commission, Civil Aeronautics Board, Federal Maritime Commission, Nuclear Regulatory Commission.

2. *Division of Health, Safety and Environmental Regulation*
Occupational Safety and Health Review Commission, Federal Mine Safety and Health Review Commission, National Transportation Safety Board, Environmental Protection Agency, Department of the Interior, National Oceanic and Atmospheric Administration, Coast Guard.

3. *Division of Labor Relations*
National Labor Relations Board, Federal Labor Relations Authority.

4. *Division of Benefits Program*
Social Security Administration.

5. *Division of Securities, Commodities and Trade Regulation*
Department of Agriculture, Commodity Futures Trading Commission, Securities and Exchange Commission, Federal Trade Commission, International Trade Commission.

6. *Division of Labor*
Department of Labor.

7. *Division of General Programs*
Drug Enforcement Administration, Department of Housing and Urban Development, Food and Drug Administration, Bureau of Alcohol, Tobacco and Firearms, Maritime Commission, U.S. Postal Service, Merit Systems Protection Board.

[40] *Id.* (proposing codification at 5 U.S.C. § 564(c)).

Corps, would govern the Corps' affairs and operations as a collegial council.[41]

Administrative law judges are presently examined by the Office of Personnel Management (OPM) which certifies the top three candidates to individual agencies for appointment to available positions as employees of those agencies.[42] The bill would preserve the present system of merit selection through OPM-administered examination of candidates.[43] It would serve to enlarge the list of eligibles from the best three to the best five candidates for each vacancy. This would increase opportunities for women and ethnic minority candidates who are less likely to be entitled to veteran's preference.[44] Existing administrative law judges would be transferred to the Corps upon the commencement of its operation and each would be assigned to a division after consideration of the areas of specialization in which the judge had served.[45] The judges would be paid uniform salaries,[46] though slightly higher salaries would be provided for the chief judge and the division chiefs.

Additionally, the bill would screen applicants for the chief judge of the Corps and the division chief judge positions by creating a five-person Judicial Nomination Commission.[47] The Commission would determine, for each vacancy, the three best qualified applicants, who had been administrative law judges for at least five years, and forward those names to the President for his appointment by and with the advice and consent of the Senate. The bill also recognizes the Presidential power to reject any list of names designated for any one position, and to request the Commission to submit another.[48]

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[41] *Id.* (proposing codification at 5 U.S.C. § 565(a)).

[42] *See* 5 U.S.C. §§ 3301, 3304, 3305 (1982).

[43] *See* S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 567(a)).

[44] OPM grades all candidates for administrative law judge positions in accordance with scores obtained in a full day written examination, an oral interview by a three person panel, and vouchers furnished by lawyers and judges familiar with their abilities and qualifying experience. Candidates who served in the armed forces have five points added to their scores and disabled veterans and other preference eligibles, married or related to disabled veterans, have ten points added under civil service laws. *See* 5 U.S.C. §§ 2108, 3309 (1982).

[45] S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. §§ 562(b), 564(a)).

[46] *Id.* (proposing codification at 5 U.S.C. § 567). The pay provisions in the bill are couched in technical terms, but when translated provide a salary in the amount many senior administrative law judges now receive.

[47] *Id.* (proposing codification at 5 U.S.C. § 566(a)). This commission would be appointed by the Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, the Chief Judge for the United States District Court for the District of Columbia Circuit, the Chairman of the Administrative Conference of the United States, the Chairman of the Administrative Law Section of the American Bar Association, and the President of the Federal Administrative Law Judges Conference. *Id.* (proposing codification at 5 U.S.C. § 566(b)).

Once its members are appointed,[49] the Council would have powers similar to those possessed by individual agencies over administrative law judges.[50] The bill, however, provides added responsibilities and duties to the Council.[51] Responsibility is also conferred upon the Council to make appropriate arrangements for continuing judicial education and training.[52]

Inasmuch as the legal specialties that concern agencies may change in the future, as will the number of judges needed to hear their cases, the Council is authorized to change the number and jurisdiction of the divisions.[53] In order to preclude the Council from completely converting the judges into "generalists," it may not reduce the number of divisions to less than four. On the other hand, to prevent a regressive movement toward employment of judges as "super-specialists," the Council may not increase the number of divisions to more than ten.[54]

The agencies would continue to have review power over decisions of the judges.

For two years from the date the Corps begins its operations, proceedings would continue to be conducted under the rules of practice promulgated by each agency.[55] After two years, the Council is authorized to prescribe uniform procedural rules. At that time, it also would report its findings and make recommendations for appropriate legislative reforms that would make review of the judges' decisions more efficient and accord greater finality to their decisions.[56] A separate study and report is required for each division.[57] This should cause the Council to take a hard look at the true nature of the various forms of administrative decisionmaking. It would require the Council to make distinctions between administrative adjudications where fairness and public satisfaction outweigh the need to accomodate agency efficiency.[58]

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[48] *Id.* (proposing codification at 5 U.S.C. § 566(e)(5)). Professor Abraham Dash noted this to be a novel methodology for screening judicial applicants, but since the bill acknowledges the President's right to reject, it should, in his opinion, withstand challenges that it unduly limits executive appointment powers contrary to the Constitution. *See infra* note 66.

[49] The bill provides for a five year term for the Chief Judge of the Corps but is silent as to the terms of the division chiefs. S. 1275, 98th Cong., 2d Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 563(a)). However, the Federal Administrative Law Judges Conference proposed that they also serve five year terms that should be staggered to avoid undue interruption of the workings of the Council. Judge V. Palmer, Chairman of the Committee on the Corps of the Federal Administrative Law Judges Conference, Prepared Statement Presented at the Senate Hearings on S. 1275 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 29 (June 23, 1983).

[50] *Compare* S. 1275, 98th Cong., 1st Sess. § 2 (1983) *with Ramspeck*, 345 U. S. at 133-43.

[51] S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 565).

[52] *Id.* (proposing codification at 5 U.S.C. § 565(d)(6)).

[53] *Id.* (proposing codification at 5 U.S.C. § 564(b)).

[54] *Id.* (proposing codification at 5 U.S.C. § 564(a)).

The Corps would have jurisdiction over all matters presently required by the APA to be conducted by an administrative law judge in lieu of hearings conducted by the agency or its members.[59] The proposed legislation also confers jurisdiction upon the Corps to hear any other case referred by federal agencies and courts for determination on a hearing record.[60]

The legislation provides for the removal, suspension, reprimand, or disciplining of judges on the basis of incompetence neglect of duties, or misconduct.[61] Judges may also be removed or suspended for physical or mental disability.[62] Under present law, an administrative law judge may be removed, suspended, reduced in grade or pay, or furloughed for up to 30 days upon a showing of good cause by the employing agency in a hearing before the Merit Systems Protection Board.[63] The language in the bill uses the more explicit language employed by Congress to subject bankruptcy judges to removal proceedings.[64] To assure that complaints against the judges are investigated fairly and expeditiously, the bill provides for their processing by panels of administrative law judges for a system of peer review.[65]

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[55] *Id.* (proposing codification at 5 U.S.C. § 565(d)(7)).

[56] *Id.* § 3.

[57] *Id.*

[58] In his illuminating work on this subject, Professor Paul R. Verkuil, Dean of Tulane University School of Law, recognizes adjudications involving the imposition of sanctions as clearly being of this nature. *See* Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 295 (1978).

[59] S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 568(a)).

[60] *Id.* (proposing codification at 5 U.S.C. § 568(d)).

[61] *Id.* (proposing codification at 5 U.S.C. § 569(a)(1)).

[62] *Id.*

[63] 5 U.S.C. § 7521 (1982).

[64] *See* 28 U.S.C.A. § 153(b) (West Supp. 1983). These provisions were enacted as appropriate to judges appointed pursuant to Article 1 of the Constitution who, unlike judges appointed pursuant to Article 3, do not have life tenure. *See also* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

IV. THE SENATE HEARINGS ON SENATE BILL 1275

The Senate Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure, has convened two hearings on Senate bill 1275.[66]

The Subcommittee heard first from a panel of administrative law judges, introduced by Judge Edwin S. Bernstein, President of the Federal Administrative Law Judges Conference.[67] Judge Bernstein emphasized that Senate bill 1275 was supported by each of the three organizations which represent administrative law judges: the Federal Administrative Law Judges Conference,[68] the National Conference of Administrative Law Judges,[69] and the Association of Administrative Law Judges, Inc.[70]

Judge Victor W. Palmer testified at length as Chairman of the Federal Administrative Law Judges Conference's Unified Corps Committee. He urged the enactment of Senate bill 1275 to redress urgent, critical problems adversely affecting Americans. Specifically, he called attention to those seeking Social Security benefits, facing the loss of licenses to engage in federally regulated businesses, those subjected to ever-increasing civil penalties for breach of federal regulations, and those otherwise dependent upon the fairness and impartiality of hearings conducted by federal administrative law judges.[71]

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[65] S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 569(c)-(g)). The bill's peer review system is akin to that now applicable to federal district court and circuit court judges, pursuant to 28 U.S.C.A. § 372(c) (West Supp. 1983). This system's prototype has recently been implemented by the United States Department of Labor to handle complaints involving its administrative law judges.

[66] The Subcommittee consists of Senator Charles E. Grassley, Chairman (R. Iowa), Senator Howell Heflin, Ranking Minority Member (D. Ala.), Senator Paul Laxalt (R. Nev.), Senator Arlen Specter (R. Pa.), and Senator Max Baucus, (D. Mont.). The hearings were held on June 23 and September 20, 1983.

See Administrative Law Judge Corps Act: Hearings on S.1275 Before the Subcomm. on Adminstrative Practice and Procedure of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. (1983) [hereinafter cited as *Hearings on S. 1275*].

[67] *See id.* at 4-24. The panel consisted of Judge Edwin S. Bernstein, Judge Victor W. Palmer, Chief Judge Duane R. Harves, and Judge Frank B. Borowiec.

[68] The Federal Administrative Law Judges Conference (FALJC) includes nearly 800 members and represents judges in each of the twenty-nine federal agencies that hold hearings conducted by administrative law judges. *Id.* at 4.

[69] The National Conference of Administrative Law Judges includes both federal and state administrative law judges as its members. It is a constituent of the American Bar Association's Judicial Administration Division which, at its 1983 mid-year meeting, passed a resolution favoring the establishment of federal administrative law judges as a separate, independent and unified corps. *Id.*

[70] The Association of Administrative Law Judges, Inc., represents the nearly 800 administrative law judges employed at the Social Security Administration. *Id.*

Judge Palmer noted that eight states have transferred their administrative law judges to independent central panels to eliminate any dependency upon agencies whose programs are directly affected by the judges' decisions. At the same time, the federal government still assigns its administrative law judges to twenty-nine departments and agencies where they are maintained and supported as subordinate employees.[72] He argued that transfer of federal administrative law judges to an independent corps where each would be assigned to a specialized division in accordance with his or her expertise, combined the best features of the present system — specialization and merit selection — with the following four improvements:

1. *Public Perception of Fairness of Hearings*

Assigning judges to a separate, unified corps instead of individual departments and agencies would eliminate the present public perception that administrative law judges, particularly those who were previously staff members, have an institutional bias in favor of the agency. Their separation from the departments and agencies who often appear before them as parties would assure actual fairness and impartiality, and restore the public's confidence that justice is indeed being done.

2. *More Efficient Use of Administrative Law Judges*

Under the present system, the management of judges and cases is divided among twenty-nine separate departments and agencies precluding the effective assignment of administrative law judges in accordance with the varying peaks and valleys in their case loads. Establishing the judges as a unified corps would enable this highly trained expert resource within the federal government to be efficiently employed to dispose of administrative proceedings.

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[71] *Id.* at 30-35. The majority of administrative law judges in the federal government are no longer assigned to proceedings involving ratemaking, licensing, or the establishment of agency rules and regulations. *Id.* at 28-29. As a chart attached to Judge Palmer's testimony demonstrated, only 6.8 percent of them are presently so employed. This is in marked contrast to the time of the APA's enactment when 63.8 percent were assigned to such cases. *Id.* at 53. Currently, administrative law judges mainly preside over adversarial type hearings and disputed claims in which the employing agency is a real party-in-interest. The change has raised the level of judicial independence needed for the administrative process to be just. *Id.* at 29-31.

[72] *Id.* at 26, 31, 40-41.

3. *Significant Cost Savings*

The establishment of a unified corps would allow improved case load management thereby reducing personnel requirements. Furthermore, substantial savings would be derived by eliminating the replication of hearing facilities and support staffs at the twenty-nine departments and agencies. Additional savings and increased productivity would be achieved through the use of modern office equipment and computers throughout the corps.

4. *Availability of Administrative Law Judges to Assist Overloaded Federal Courts*

The bill expressly authorizes federal courts to refer specialized proceedings to administrative law judges serving as special masters. Under this provision, an existing cadre of administrative law judges would be identified as being immediately available to assist the federal judiciary and provide an inexpensive remedy to the pressing problems now facing the federal courts.[73]

Judge Duane R. Harves, Chief Hearing Examiner, State of Minnesota, Office of Administrative Hearings, next testified in support of the proposed legislation. He noted that on January 1, 1976, Minnesota created a totally independent hearing agency similar to the unified corps that Senate bill 1275 would establish. He stated that the creation of the centralized Minnesota Office of Hearings had dramatically decreased costs of hearings, increased efficiencies, and decreased the time in which decisions were issued.[74] He testified that the division of the office into areas of special expertise had preserved specialization and, in every way, the Minnesota experience had been a resounding success.[75]

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[73] *Id.* at 46.

[74] *Id.* at 8-11. Judge Harves supplied statistics showing that the cost of hearings to the Minnesota Public Utilities Commission was reduced from $311,330 in fiscal year 1977, the first year his centralized hearings office was in operation, to $184,219 for fiscal year 1982. The cost of hearings conducted for the Department of Commerce fell from $120,000 to less than $60,000. *Id.* at 87. Despite inflation and the doubling of the salaries paid to hearing examiners, Minnesota has not had to increase the amounts budgeted for his office's operation. *Id.* Moreover, the total staff was reduced by forty percent, with the number of examiners reduced by twenty-seven percent. *Id.* at 88. The length of time for decisions to be issued in workers' compensation cases fell from 101 days following the close of the hearing record in December 1981, to forty-six days in May 1983; and, the average backlog per examiner likewise decreased from fifteen cases to four cases. *Id.* at 89.

The final panel member, Judge Borowiec, testified on behalf of the Association of Administrative Law Judges, Inc., and its administrative law judges employed at the Social Security Administration, Department of Health and Human Services.[76] He reinforced Judge Palmer's testimony and described the agency pressures that have been brought to bear upon the judges at the Department of Health and Human Services.[77] In their opinion, he advised, such agency pressures squarely conflicted with the traditional American standard of justice and the enactment of Senate bill 1275 was essential.

The next panel included Herbert E. Forrest, Esq., and Professor Abraham Dash. Mr. Forrest is a partner in the Washington law firm of Steptoe and Johnson and is President of the Federal Communications Bar Association. Professor Dash is a member of the University of Maryland Law School faculty and has written extensively in the field of administrative law. Both Mr. Forrest and Professor Dash supported the bill.

Mr. Forrest was critical of the present system under which administrative law judges "are housed, sustained, and are ranked as (agency) employees. . . . [N]ot only are they seen as having, but they do in fact have, however unconsciously, a bias toward the agency which is often a party to the proceeding, and a partiality toward the view of agency staff."[78] On the merits of whether judges should be specialists, Mr. Forrest stated:

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[75] *Id.* at 9-10. Although unable to appear in person, Judge Howard H. Kestin, Director, State of New Jersey Office of Administrative Law, reported similar dramatic benefits under the New Jersey centralized system established in early 1979. Since that time, the number of hearing officers has decreased from 130 to forty-five, each of whom disposed of an average of 226 cases in fiscal year 1982. Despite inflation, the average cost of processing a case decreased from $540 in fiscal year 1980 to $508 in fiscal year 1982. *Id.* at 75-77.

[76] At present, there are 769 administrative law judges at this agency.

[77] *See* SUBCOMM. ON OVERSIGHT OF GOV'T MANAGEMENT OF THE SENATE COMM. ON GOV'TAL AFFAIRS, THE ROLE OF ADMINISTRATIVE LAW JUDGE IN THE TITLE II SOCIAL SECURITY DISABILITY INSURANCE PROGRAM, S. REP. NO. 111, 98th Cong., 1st Sess. (1983) [hereinafter cited as THE ROLE OF THE ADMINISTRATIVE LAW JUDGE]. Based upon the hearing the Subcommittee conducted on this issue on June 8, 1983, its Chairman, Senator William S. Cohen and Ranking Minority Member, Senator Carl Levin, reported:

> The Subcommittee's principal finding is that the SSA is pressuring its administrative law judges to reduce the rate at which they allow disabled persons to participate in or continue to participate in the Social Security disability program. (The SSA has been successful in its efforts as evidenced by recent statistics showing a dramatic decline in the administrative law judge allowance rate in the past year and a half from 67.2 percent in mid-1982, to 51.9 percent in June 1983). The Subcommittee also finds that the SSA is imposing this pressure through several means including the inequitable and unjustified targeting of only allowance decisions and high allowance judges for review pursuant to an amendment sponsored by Senator Henry Bellmon and passed in 1980 (Bellmon Review), and the use of minimum production quotas and productivity goals.

Id. at III.

> [I]t makes all trial and appellate judges the greater for their experience that they do not sit with the narrow tunnel vision of specialization, but are exposed, not only to new ideas, and new situations, but also to different views and perceptions of old issues, for example, how different agencies look at ratemaking to derive a more comprehensive, balanced and creative decision. It may not be something that can be demonstrated empirically, but I believe it's there.[79]

Professor Dash stated that the concept of a unified corps of administrative law judges had been one that was proposed as far back as 1946 when the Administrative Procedure Act came into being, and the essential question was not whether a unified corps of federal administrative law judges should be enacted, but, why it still had not been enacted.[80]

The final witness at the initial hearing was Loren A. Smith, Chairman, Administrative Conference of the United States. Chairman Smith listed the chief benefits of Senate bill 1275 as increased efficiency, cost savings, greater public confidence in the impartiality and independence of administrative law judges, and diversification of the judges' experience. He further observed that it would allow an objective, credible system to be designed for evaluating the judges' performance, and could lead to a more unified, coherent approach by Congress to agency adjudication. As for the bill's negative implications, he cited reduced expertise, the creation of a new bureaucracy, unforeseen interference with the ultimate decisional responsibility of individual agencies, and the need to devise an equitable system for allocating the judges to the agencies. The latter could be allocated by pro rata sharing of adjudicative costs, to prevent drawing too liberally upon the judges' services when not actually needed. On balance, he favored the corps concept embodied in the bill on efficiency grounds, and suggested that an experimental model might be created first for a four year trial period, to include only those judges in the fifteen smallest agencies.[81]

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[78] *Hearings on S. 1275*, *supra* note 66, at 97.

[79] *Id.*

[80] *Id.* at 98.

[81] *Id.* at 108-12. The Administrative Conference consists of ninety-one members

At the second hearing on September 20, 1983, Mr. Geoffrey S. Stewart and Mr. Joseph A. Morris testified for the Department of Justice and the Office of Personnel Management.[82]

Mr. Stewart offered the view of the Department of Justice that a change of such magnitude in the national administrative judiciary called for thorough reflection and detailed empirical study. In the Department's opinion, administrative law judges presently had sufficient protections to assure their independence.[83] He also expressed concern that the proposal would create a "generalist corps" of administrative law judges, and would "unnecessarily impede the implementation of agency policies."[84] Finally, he presented objections to several details of the bill. He took issue with the creation of a collegially functioning Council consisting of the Corps' chief judge and division chiefs as a means of governing the Corps' operation and appointment of new administrative law judges; the creation of a Complaints Resolution Board to discipline judges under a system of peer review; and the creation of a Judicial Nomination Commission to recommend qualified administrative law judges for presidential appointments as members of the Council.

Mr. Morris argued that the legislation would dilute the agency program expertise of administrative law judges and agencies would not be able to rely upon timely processing of hearing requests. He emphasized that there was a need for "agency administrative control over [administrative law judges]."[85] Additionally, he objected to the bill's salary provisions.

Althea T. Simmons, Director of the Washington Bureau of National Association for the Advancement of Colored People questioned whether the bill would promote the independence of administrative law judges or increase their efficiency. In her opinion, the Administrative Procedure Act amply insulated administra-

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and twenty-two liaison representatives. It includes representatives of federal departments and agencies, the private bar, law schools, and professional associations. One of the authors serves as a liaison representative to the Administrative Conference as President of the Federal Administrative Law Judges Conference.

[82] Mr. Stewart is Deputy Assistant Attorney General, Office of Legal Policy at Department of Justice. *Id.* at 125. Mr. Morris is General Counsel at Office of Personnel Management. *Id.* at 137.

[83] *Id.* at 126. Jonathan C. Rose, Assistant Attorney General, Office of Legal Policy, clarified that the testimony given on behalf of the Department of Justice "does not reflect any disagreement with the laudable objectives of the bill's proponents. . . ." Letter from Jonathan C. Rose to Victor W. Palmer (Dec. 13, 1983).

[84] *Hearings on S. 1275*, *supra* note 66, at 126, 127.

[85] *Id.* at 141.

tive law judges from inappropriate agency control. She acknowledged, however, that with respect to the Social Security judges, "the intrusion of that agency upon the decisional independence of the administrative law judges appears highly inappropriate."[86] The more desirable legislative cure for that problem, in her opinion, was to establish an independent Health and Human Services Review Commission to which all Social Security judges should be transferred. She was also skeptical as to the advantages of judicial "generalists" over "specialists" and expressed concern regarding the potential for politicization of a unified corps of administrative law judges.[87]

Next, John T. Miller, Jr., an attorney with many years of experience in administrative law, testified in support of the Bill.[88] Mr. Miller declared that an administrative law judge corps would assure uniform work loads, thereby enabling better use of administrative law judge time. At present, he continued, each agency and department determines whether funds will be provided for the continuing legal education of their administrative law judges. "At a time when the judiciary throughout the nation has come to recognize the value of such education in terms of more effective and efficient administration of justice, there is an obvious deficiency in the opportunities in the funding of continuing education for federal [administrative law judges]."[89] He expressed confidence that a unified corps would better attend to the need for continuing education and training of administrative law judges. Mr. Miller added that emphasis on expertise is often a misplaced value, stressing the example of federal courts where specific expertise has not been a necessary qualification of judges who review agency decisions.

Acting on behalf of an *ad hoc* committee of fifteen federal administrative law judges who favored continuation of the status quo, Judge Joseph B. Kennedy testified that the current process provided for sufficient independence of federal administrative law judges.[90] He contended that the situation at Social Security was the only known circumstance in which administrative law judges had been subjected to an inappropriate degree of agency control. He suggested that the establishment of an independent review commission to house Social Security judges would be a more appropriate response to that problem. He disagreed that the bill would result in substantial savings; rather the proposal would "interfere with the agency's ability to perform the functions for which they were created."[91] In his opinion, although the bill purported to create specialized divisions, the existence of those divisions would be temporary and readily altered by vote of the Council of the Corps. He concluded that the proposal would create an unwieldy bureaucracy requiring additional employees.

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[86] *Id.* at 165.
[87] *Id.* at 165-67.
[88] *Id.* at 152.
[89] *Id.*
[90] *Id.* at 156.

The next witness was Robert H. Joost who testified as a private citizen supporting the creation of a unified corps of administrative law judges. He remarked that an administrative law judge's federal agency employer almost always appeared before the judge as a litigant and that this necessarily created the appearance of unfairness. Similarly, appropriate agency disciplining of a judge was difficult because it might appear to have improperly affected his or her judicial independence. Mr. Joost then submitted wide-ranging recommendations he believed would improve the bill: transferring responsibility for examining future applicants from OPM to the Corps; expanding the types of legal experience which would qualify applicants; further dividing the divisions of the Corps into more specialized subdivisions or panels; and, creating a class of GS 13/14 "Administrative Examiners" to hear less important cases thereby creating a career ladder for administrative law judges.[92]

The final witness, Professor Victor G. Rosenblum testified that in his 1975 study for the Administrative Conference of the United States, he recommended that the time was not yet right for the creation of an administrative law judge corps. As a witness in 1983, however, he stated: "I'm convinced that now is the hour for such a Corps."[93] He then reviewed his rationale in 1975 and explained how three of the four factors which accounted for his position at that time had significantly changed between 1975 and 1983.The factor he found unchanged was proof that the operation of the administrative law judge program would not be impaired by political corruption or other improper influences.[94]

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[91] *Id.* at 184.

[92] *Id.* at 191-93. Mr. Joost is a former member of the professional staff of the Senate Judiciary Committee and at present is a hearing officer for the Commodity Futures Trading Commission.

[93] *Id.* at 194. Professor Rosenblum has been a professor of law at Northwestern University since 1958, is a past chairman of the Administrative Law Section of the American Bar Association, and is the current vice-president of the American Judicature Society. His article entitled *Contexts and Contents of "For Good Cause" As Criterion for Removal of Administrative Law Judges: Legal and Policy Factors* also appears in this symposium.

One factor which had changed was the failure of a compromise made between the Administrative Conference and the Civil Service Commission in 1962. Under that compromise the Administrative Conference had refrained from recommending removal of the hearing examiner program from the Commission on the basis of its promise to institute improvements responsive to a detailed critique of the Commission's operation of the program by Professor Wilbur Lester, then staff director of the Administrative Conference's Committee on Personnel.[95] Professor Rosenblum stated that the Commission's promise was not kept:

> The period of constructive implementation of the Conference"s 1962 recommendation which was exemplified by such promising steps as utilization of a comprehensive written examination, involvment of renowned practitioners and members of the academic community in the oral phase of the examination, addition of trial experience as one basis for qualification for appointment, and establishment of the La Macchia Committee to study multiple dimensions of the status and utilization of administrative law judges, has long since lapsed into limbo.
>
> The change in agency title in 1979 from Civil Service Commission to Office of Personnel Management and the division of functions between OPM and the Merit Systems Protection Board wrought no concomitant renewal of reformist energy or zeal. . . .
>
> General Accounting Office studies of management of the administrative law process offer no reason to believe that [OPM] has made a salient priority of the implementation or evaluation of proposals for improving roles, functions and performance of [administrative law judges]. On the contrary, GAO has been overtly critical of management of the administrative law process.[96]

Another factor which had changed was the development of empirical data substantiating the achievement of major benefits through implementation of central panel systems in seven states. The new evidence, he found, demonstrated "clearly that the corps concept is practicable and feasible."[97]

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[94] *Id.*

[95] *Id.* at 194-95; *see* W. LESTER, REPORT ON SECTION II HEARING EXAMINERS TO THE COMMITTEE ON PERSONNEL OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 28 (1962).

[96] *Hearings on S. 1275*, *supra* note 66, at 195-96.

[97] *Id.* at 196-97. The seven States are California, Colorado, Florida, Massachusetts, Minnesota, New Jersey and Tennessee. *See generally* M. RICH & W. BRUCAR, THE CENTRAL PANEL SYSTEM FOR ADMINISTRATIVE LAW JUDGES: A SURVEY OF SEVEN

Professor Rosenblum concluded that the Civil Service Commission and its successor, the Office of Personnel Management, had failed to follow through on the LaMacchia Committee recommendations[98] and failed to develop an effective administrative law judge program: a "fresh start through the corps concept is warranted, promising and practicable in Senate bill 1275."[99]

V. THE ARGUMENTS FOR AND AGAINST ENACTMENT

Persuasive arguments for the establishment of federal administrative law judges as an independent, unified corps through enactment of Senate bill 1275 have been advanced by the practicing bar,[100] eminent professors of law,[101] and the administrative law judges.[102]

Opponents, however, argue that with the exception of the Social Security Administration (SSA), there is no evidence of agency interference with the judicial functions of administrative law judges. They suggest that the more appropriate legislative response would be to vest jurisdiction over social security cases in a new, independent review commission to which administrative law judges now employed by SSA would be transferred. Additionally, opponents have articulated fears that enactment of the bill will lead to politicization of the administrative law judge system, a reduction of agency efficiency through agency loss of control of their dockets, the replacement of "specialists" by "generalists," and the creation of an even more expensive, unwieldy bureaucracy.[103]

The strength of the arguments favoring the Corps' establishment perhaps are measured best in the context of these doubts and fears.

A. *Interference With Judicial Functions of Administrative Law Judges by Agency Employers*

Witnesses who testified in support of the Heflin bill did not un-

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STATES (1983). The State of Washington, on July 1, 1982, became the eighth State to employ a central panel system.

[98] *Hearings on S. 1275*, *supra* note 66, at 197-98. *See supra* note 37 and accompanying text. This study was conducted by a panel of administrative law judges chaired by the Civil Service Commission's then Deputy Counsel.

[99] *Hearings on S. 1275*, *supra* note 66, at 198.

[100] *See supra* text accompanying notes 88-89.

[101] *See supra* text accompanying note 92-99.

[102] *See supra* text accompanying notes 67-77.

[103] *See supra* text accompanying notes 82-87.

dertake a comprehensive survey of practices at every federal department and agency which interfere with the judicial functions of administrative law judges in their employ. The focus on agency interference and pressuring was restricted to the practices at the SSA, the current subject of extensive media coverage[104] and a congressional oversight hearing which resulted in the issuance of a severely critical report.[105]

The report documented SSA's pressuring of its administrative law judges to decide against claims by the disabled.[106] It charged that pressure was exerted through the use of minimum production quotas, targeting decisions by high allowance judges for agency review, improperly using internal guidelines to bind its judges, and prohibiting them from following selected court precedents.[107] A New York Times editorial[108] also charged that these practices by the SSA were in response to a decision by the administration to eliminate fraudulent claims and reduce the $18 billion year expended to pay 4 million workers and their dependents. SSA's responsiveness to the administration's policies caused it to use its position as the employer of administrative law judges to interfere with their judicial functions.[109]

Every federal agency where administrative law judges are employed is motivated to be responsive to its administration's policies. It is more difficult, however, to document equivalent pressuring by other agencies. Because SSA employs 769 administrative law judges[110] in approximately 100 offices, it necessarily communicates its policy in writing. Other agencies, that have a smaller cadre of judges located in a single office, communicate orally. Even so, instances of interference with the judicial functions of administrative law judges by other agencies have surfaced.[111]

In 1976, the Undersecretary of the Interior disagreed with a decision by an administrative law judge at that agency.[112] Instead of simply reversing the decision, as was the agency's right, the Undersecretary placed an official reprimand in the judge's personnel file, placing the judge's qualifications under a cloud and hindering his opportunities for future promotion or new employment. The reprimand was later expunged pursuant to an opinion by the Attorney General, but only after the expenditure of considerable legal fees which the Federal Administrative Law Judges Conference helped to defray. In finding that the reprimand conflicted with the APA, the Attorney General nonetheless recognized the right of an agency to reprimand its judges as well as its right "to assign or withhold parking spaces, . . . establish working hours, [and] assign secretarial assistance."[113]

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[104] *See, e.g.*, *Give the Disabled a Grandfather*, N.Y. Times, Oct. 18, 1983, at A30, col. 1.; Public Broadcasting Station Documentary, Who Decides Disability? (June 20, 1983) (Transcript available through WGBH-TV, 125 Western Avenue, Boston MA 02134).

[105] *See supra* note 77.

[106] *Id.*

[107] *Id.*

[108] *Give the Disabled a Grandfather*, N.Y. Times, Oct. 18, 1983, at A30, col. 1.

[109] *Id.*

[110] OFFICE OF PERSONNEL MANAGEMENT, TOTAL NUMBER OF ALJs ON BOARD BY GRADE AND AGENCY AS OF NOV. 21, 1983 (1984).

[111] 43 Op. Att'y Gen. 1 (1977).

Administrative law judges at every federal agency are vulnerable to such discipline. The fact that wrongful actions may eventually be reversed after costly litigation provides little comfort.

Although the APA requires administrative law judges to be assigned to cases in rotation,[114] the Supreme Court in *Ramspeck* interpreted the modifying words "so far as practicable" to allow assignments on the basis of "the experience and ability of the examiner available."[115] This interpretation has permitted questionable agency practices in making case assignments. *PATCO v. Federal Labor Relations Authority*,[116] contains a disturbing finding respecting the assignment of the Air Controller's strike case: "On August 4, 1981 [Federal Labor Relations Authority (FLRA) members]. . . met with [FLRA's Chief Administrative Law Judge]. . . at lunch to discuss the procedural aspects of the PATCO case. During that discussion, it was suggested that [the Chief Judge]. . . appoint a capable judge, preferably himself, to hear the PATCO case. . . ."[117] FLRA's Chief Judge complied and assigned the case to himself.

On September 5, 1980, in a hearing before the Consumer Subcommittee of the Senate Committee on Commerce, Science and Transportation, FTC's Chief Judge testified that all eleven of the FTC's administrative law judges, at one time or another, served as staff attorneys at the Commission.[118] He further confirmed that in

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[112] *Id.*

[113] *Id.*

[114] 5. U.S.C. § 3105 (1982).

[115] 345 U.S. at 139-40.

[116] 685 F.2d 547 (D.C. Cir. 1982).

[117] *Id.* at 619.

[118] *Administrative Law Judge System: Hearings Before the Subcomm. for Consum-*

August 1978, the FTC judge assigned to a case involving the Kellogg Company[119] advised the agency of his plans to retire. The FTC retained him on the case through a special contract which gave him both his pension and salary while he served "at the will of the appointing officer."[120] Kellogg, upon being informed of the arrangement, vigorously objected and the judge was replaced.[121]

Agency rules of practice are typically prepared by their general counsel. This can result in rules that favor the agency over the other parties who may appear before its administrative law judges.[122] The Heflin bill's provisions for the establishment of uniform rules of practice by the Corps, led one agency official to make this enlightening protest:

> § 565(d)(7) authorizes the policymaking body of the Corps to "prescribe the rules of practice and procedure for the conduct of proceedings before the Corps." As Oliver Wendell Holmes once said, "substantive law is secreted in the interstices of procedure." The effect of § 565(d)(7) will be to surrender, in subtle ways, part of the Agency's substantive rulemaking authority to the Corps.[123]

The NLRB's rules of practice were before the Supreme Court in *NLRB v. Robbins Tire & Rubber Co.*[124] which upheld the board's right to bar prehearing discovery. However, this one-sided aspect of its rules of practice evoked the following comment from Justice Powell:

> I do not read the Act to authorize agencies to adopt or adhere to nonstatutory rules barring all prehearing disclosure of investigatory records. The Court reasons, . . . that such disclosure — which is deemed "premature" only because it is in advance of the time of release set by the agency — will enable "suspected violators" . . . to learn the Board's case in advance and frustrate the

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ers of the Senate Comm. on Commerce, Science, and Transportation, 96th Cong., 2d Sess. 117 (1980) (Statement of Ernest Barnes, C.A.L.J., F.T.C.) [hereinafter cited as *1980 Hearings*].

[119] *Kellogg Co.*, 99 F.T.C. 8 (1982).

[120] *1980 Hearings*, *supra* note 118, at 117.

[121] *Id.*

[122] The Department of Agriculture's rules of practice, for example, prohibit its administrative law judges from dismissing on the pleadings, any of the complaints Department lawyers file in enforcement proceedings. 7 C.F.R. § 1.143(b) (1983). Conversely, in proceedings where Agriculture defends petitions seeking relief, the judges are directed to entertain its motions to dismiss petitions for being defective in form. *Id.* § 900.52(c).

[123] Environmental Protection Agency Memorandum from Ronald L. McCallum, Judicial Officer, to Virginia Gibbons, Office of Legislation (July 14, 1983).

[124] 437 U.S. 214 (1978).

> proceedings or construct defenses which would permit violations to go unremedied. . . . This assumption is not only inconsistent with the congressional judgment expressed in the Federal Rules of Civil Procedure that "trial by ambush". . . may well disserve the cause of truth, but it also threatens to undermine the Act's overall presumption of disclosure, at least during the pendancy of enforcement proceedings.[125]

The Senate Subcommittee on Oversight of Government Management described SSA's refusal to accord precedential weight to selected court decisions as a policy of "non-acquiescence."[126] This policy of non-acquiescence is not limited to SSA.[127] The right of agencies to engage in these policies involves complex and difficult constitutional questions.[128] Enactment of Senate bill 1275 would not in itself resolve the constitutional problems, but its provisions do call for a study, division by division, examining the ways in which agencies review decisions by administrative law judges. This kind of review undertaken by the Corps' Council would indeed be an important first step.

Even if no constitutional issues existed, when an agency directs its administrative law judges to ignore otherwise binding court precedents, the judges are being asked to give priority to their duties as employees over their judicial responsibility.[129]

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[125] *Id.* at 253 (Powell, J., concurring and dissenting) (citations omitted).

[126] *See supra* note 77.

[127] The Subcommittee indicated that SSA argued "its policy was no different than that of the Internal Revenue Service (IRS)." THE ROLE OF THE ADMINISTRATIVE LAW JUDGE, *supra* note 77, at 27.

[128] The subcommittee report referred to three principal constitutional issues: (1) the doctrine of separation of powers; (2) the doctrine of *stare decisis*; and (3) the due process rights of litigants. *Id.* at 28-29. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Yellow Taxi Co. of Minn. v. NLRB, 721 F.2d 366 (D.C. Cir. 1983); Frock v. United States R.R. Retirement Bd., 685 F.2d 1041 (7th Cir. 1982), *cert denied*, 103 S. Ct. 1185 (1982); S & H Riggers & Erectors, Inc. v. OSHRC, 659 F.2d 1273 (5th Cir. 1981); Jones & Laughlin Steel Corp. v. Marshall, 636 F.2d 32, 33 (3d Cir. 1980); ITT World Communications v. FCC, 635 F.2d 32, 43 (2d Cir. 1980); Ithaca College v. NLRB, 623 F.2d 224, 228-29 (2d Cir.), *cert. denied*, 449 U.S. 975 (1980); Mary Thompson Hosp., Inc. v. NLRB, 621 F.2d 458, 864 (7th Cir. 1980); Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 970 (3d Cir. 1979); *see also* Siedlecki v. Schweiker, 563 F. Supp. 43, 46-48 (W.D. Wash. 1983); Chee v. Schweiker, 563 F. Supp. 1362, 1364-65 (D. Ariz. 1983); Hillhouse v. Harris, 547 F. Supp. 88, 93 (W.D. Ark. 1982), *aff'd*, 715 F.2d 428 (1983).

[129] The Senate Subcommittee stated the problem as follows:

> The [administrative law judges] are also detrimentally affected by the SSA's policy of non-acquiescence. The [administrative law judges] predicament was described in *Hillhouse* v. *Harris*, when the court indicated that the [administrative law judges] are caught in the most unenviable position of "trying to serve two masters; the courts and the Secretary of Health and Human Services."

The problem caused by agency refusals[130] to accede to court decisions interpretory of the laws agencies administer was stated by Professor Jaffe:

> The scope of judicial review is ultimately conditioned and determined by the major proposition that the constitutional courts of this country are the acknowledged architects and guarantors of the integrity of the legal system. . . . An agency is not an island entire of itself. . . . The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law;. . .[131]

B. *Politicization*

Those who would maintain the status quo argue that the Corps' establishment must ultimately lead to destruction of the present system for merit appointment of federal administrative law judges. They fear that as administrative law judges stand separate and apart from agencies, and have heightened visibility, there will be a concomitant increase in pressures to discard the merit selection system. They view the bill's provisions for Presidential appointment of the chief judge and division chiefs as a template which will eventually apply to all administrative law judge appointments.[132]

The fear is unfounded. The bill does not alter the present sys-

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> Moreover, this situation is demoralizing to the [administrative law judges] who know that their judicial efforts may be meaningless. If they adhere to the SSA's non-acquiescence ruling, their decisions may be overturned in Federal court because they failed to follow prededent; and if they adhere to the courts' decisions, their decisions may be overturned by the SSA through the Appeals Council. To say the least, this practice creates a professional and judicial quandary for the [administrative law judge]."

THE ROLE OF THE ADMINISTRATIVE LAW JUDGE, *supra* note 77, at 30.

[130] In Yellow Taxi Company of Minneapolis v. NLRB, 721 F.2d 366 (D.C. Cir. 1983), the court stated: "No court can overlook an agency's defiant refusal to follow well established law. . . . Some members of the Board have historically arrogated to themselves the authority to 'disagree' with judicial precedent." *Id.* at 382. In justifying its refusal to give precedential weight to a decision by a United States circuit court, another agency explained the decision was the result of "judicial illiteracy," or the court "was so busy that it brushed the case aside in order to avoid the onerous chore of giving full consideration to the case," or was an attempt to avoid "summary reversal by the Supreme Court" through "disguise" of the court's real motive. *In re* Shatkin, 34 Agric. Dec. 296, 307-13 (1979) (discussing Economou v. USDA, 494 F.2d 519 (2d Cir. 1974)).

[131] Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 190-91 (1973) (Stewart, J., dissenting) (quoting L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 589-90 (1965)).

[132] *See supra* text accompanying notes 82-87 & 90-91.

tem of merit selection of administrative law judges.[133] Nor is there any reason to believe that its passage will lead to modification of this system.

The bill requires council members to be selected from administrative law judges who possess five years prior experience. Screening of applicants would be administered by a panel selected by two federal judges, the Chairman of ACUS, and leading members of the bar and the administrative law judge community.[134] These requirements, taken together, make it unlikely that the positions will go to those whose only qualification is loyalty to the political party in power. Moreover, provisions in the bill for processing complaints of incompetence or misconduct are equally applicable to council members and may be instituted by anyone, including administrative law judges who believe their functions have been improperly influenced by council members.[135]

It has also been suggested that placing administrative law judges under the control of politically appointed division chiefs and the chief judge, will lead to politicization of the Corps, but such a system would be far less enmeshed in politics than the present one which subordinates the judges to political appointees. Currently agency heads are committed to the policies of the administration in office, whereas the chief judge and division chiefs of an independent Corps would have no such commitments.

C. *Reduced Efficiency When Agencies Lose Control of Their Dockets and "Generalists" Replace "Specialists"*

Critics of the bill insist that because a unified corps will not be as responsive to agency needs and priorities, case backlogs must result unless agencies retain control over the dockets.[136] As with any other government agency, however, the Corps will be answerable to the President and the Congress for budgeted funds and must be responsive to such criticisms. Virtually every tribunal has procedures for according time priorities to matters requiring expedited treatment.[137] Similar procedures could be mandated for the Corps.

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[133] *See* S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 567(a)).

[134] *See id.* § 4.

[135] *See id.* § 2 (proposing codification at 5 U.S.C. § 569).

[136] *See Hearings on S. 1275, supra* note 66, at 133-35 (statement of Geoffrey S. Stewart, Deputy Assistant Att'y Gen., Office of Legal Policy, Dep't of Justice); *id.* at 294-95 (statement of C.M. Butler III, Chairman, FERC).

[137] Rule 12 of Uniform Rules of Procedure for Boards of Contract Appeals under

When the Comptroller General studied the administrative law process, he concluded that the delays that have plagued it are not attributable to administrative law judges. There are two major causes for delays in the administrative process — extensive agency review of administrative law judges' decisions and the use of more complex judicial procedures than necessary to resolve some disputes."[138] The positive aspect of reduction in agency control over dockets is that opportunities to manipulate or predict case assignments would end.

Agency officials have also voiced concern that program expertise may be lost through the Corps' establishment. The bill, however, recognizes the importance of specialized expertise and provides for its continuance. The Corps would initially consist of seven divisions which the Council could expand to ten. The Council could also achieve more intensive specialization within the divisions through regulations establishing special panels or sections.

The Corps' divisions have been structured in accordance with major specialties of administrative law. Judges presently employed by federal agencies would be assigned to divisions on the basis of their existing legal expertise. The powers conferred upon the Corps' Council permit it to require new judges or judges seeking transfers to participate in appropriate training programs prior to assignment to a division.[139] Optimally, a division chief would assign complex cases from an agency to judges who previously served there or otherwise have proven expertise in that area. As each judge acquired experience in new fields of expertise, all would eventually be qualified to hear any case assigned to the division.

Many knowledgeable educators, practitioners and members of the judiciary unequivocally state that the importance of specialization is overemphasized. Those who advocate to the contrary, exaggerate the time it would take to learn various specialties of administrative law.[140] As John T. Miller, a private practitioner of

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the Contract Disputes Act of 1978, promulgated by Office of Management and Budget for all federal boards of contract appeals, establishes both expedited procedures for small claims and accelerated procedures for various other cases. 10 C.F.R. § 1023.20 (1983).

[138] Comptroller General's Report to The Congress, Administrative Law Process: Better Management Is Needed, FPCD078-25, Cover Sheet (May 15, 1978). *See also* Comptroller General's Report to the Congress, Management Improvements in the Administrative Law Process: Much Remains to be Done, FPCD-79-44 (May 27, 1979) (follow-up report).

[139] S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 561).

[140] One of the authors of this article serves the Department of Agriculture which administers no less than fifty separate statutes. Each time the responsibility for a statute

law who testified at the Senate Judiciary Committee hearing asserted: " It has not been in the Anglo-American tradition to appoint lawyers as judges on the basis of a narrow, and, perhaps, temporary expertise. . . . No lawyer should be appointed an [Administrative Law Judge] who lacks the energy, intellect and discipline to acquire needed expertise."[141]

D. *The Corps Will Not Be a More Expensive, Unwieldy Bureaucracy*

There is a current perception that an agency, once created, rapidly expands its staff and budget to become a self-perpetuating empire. This is the *ratio decidendi* of the new sunset laws designed to cause agencies to self-destruct unless they can affirmatively demonstrate their ongoing usefulness. Those who oppose the establishment of administrative law judges as an independent, unified corps, project a similar self-aggrandizing scenario.

But the work of the Corps will never be of its own making. Every adjudicative function Congress entrusts to the Executive Branch creates a correlative need for fair and impartial arbiters. The proposed legislation merely assembles, under one supervisory authority, those who hear APA-type proceedings. The work will be there whether or not the Corps is established. The costs of conducting proceedings with a corps in place should be less than under the present system.

There is no practical method at present for assigning judges to proceedings in a meaningful relationship to the actual caseloads at each agency. Offsetting peaks and valleys in agency needs for hearings by administrative law judges are not now adjusted.

The OPM administered loan program has not solved this prob-

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or program has been added or taken away, the variety of cases heard by the department's judges changes. The administrative law judges at the Department of Labor also hear and decide an equivalently large variety of cases under diverse statutes and regulations. Typical of a number of administrative law judges who have been able to quickly adapt to differing areas of expertise during the course of their judicial careers, the other author of this article has specialized as a member of a board of contract appeals in government procurement law and as an administrative law judge at several agencies where he has decided labor-management, workers' compensation, child-labor, and other cases for the Department of Labor; civil penalty cases for the Federal Mine Safety and Health Review Commission; false advertising cases for the Postal Service; and debarment cases for the Small Business Administration (SBA). The SBA debarment cases were heard pursuant to a loan program administered by the Office of Personnel Management, under which many judges have quickly and successfully adapted to cases of administrative law completely disparate from those they normally hear and decide.

[141] *Hearings on S. 1275*, *supra* note 66, at 173.

lem. Although an excellent theoretical solution, it conflicts with pragmatic agency concerns. The same reason given by many agencies in opposition to the Corps' establishment - lack of agency control - often persuades agencies to assign non-APA protected in-house employees to hearings, where possible, rather than borrowing unknown administrative law judges. More importantly, lending agencies must concede that their judges are underworked, which could imply that they have too many judges, prosecuting attorneys and other personnel, and could result in reductions in appropriated funds and staff.

The establishment of a corps should not increase any of the major costs of maintaining administrative law judges. These costs consist of payroll, physical facilities and travel. The Corps' anticipated consolidation of functions and elimination of duplication should decrease each of these cost components. Merely because the Corps will be a new agency does not mean there will be additional costs. At present, administrative law judges frequently make arrangements through the General Services Administration for the use of hearing room facilities.[142] There would be no change in this practice. The vast majority of administrative law judges are presently located throughout the nation in GSA owned or leased buildings. There would be no reason to move those judges.

The eventual consolidation of administrative law judges located in Washington will decrease costs by reducing the number of square feet required for hearing rooms, libraries, etc. The bill provides for the transfer of support personnel from agencies that now employ administrative law judges. Therefore, the establishment of a corps will not result in the hiring of additional personnel. The employment of modern computers and other equipment by the Corps should eventually reduce the size of its staff.

These anticipated cost savings have been experienced in states which have implemented similar centralized systems of administrative adjudication.[143] Furthermore, as public confidence in the administrative judiciary is increased, appeals to federal courts should decrease with resulting cost savings to both the executive and the judicial branches of the federal government.

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[142] Each United States district court maintains little used courtrooms in cities where it infrequently sits. The United States Tax Court has hearing rooms in most major cities that are frequently idle and available. State and local governments are also generally cooperative. In addition, a special law school training program, participated in by both authors, has been recently developed by the ABA's National Conference of Administrative Law Judges in which agency hearings are conducted before students in law schools' moot court facilities, after which the presiding administrative law judge lectures on the practical aspects of administrative law.

[143] *See supra* notes 74, 75 & 96.

VI. CONCLUSION

Enactment of the Heflin bill would rectify a fundamental conflict between requisites of the Constitution and the present system for employment of federal administrative law judges.

They are presently housed as subordinate employees of agencies which may be motivated to interfere with judicial functions. The most striking example of actual interference is provided by the Social Security Administration. These practices conflict with the Due Process Clause of the Constitution.[144]

It is no answer to these arguments that the agency interferences were in pursuit of honorable ends which the agency sought to implement in the most efficient manner. "Indeed, one might fairly say of the Bill of Rights in general and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials."[145]

Eight states have now recognized that the role of the administrative judiciary is inconsistent with their employment by individual regulatory agencies and departments of the executive branch.[146] The use of central panel systems by those states have proven successful and saved money. There is every reason to believe that the federal government would enjoy similar cost savings by establishing its administrative law judges as an independent, unified corps.

Bernard G. Segal, past president of the American Bar Association, perhaps best explained the essential reason why an independent administrative judiciary is needed:

> Consider, for example, the unavoidable appearance of bias when

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[144] A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. Our system of law has always endeavored to prevent even the probability of unfairness. The Supreme Court has said that "[e]very procedure which would offer a possible temptation to the average man as a judge. . .not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." Tumey v. Ohio, 273 U.S. 510, 532 (1927). Such a stringent rule may sometimes bar trial by judges who, having no actual bias, attempt to weigh the scales of justice equally between contending parties. In order to perform its high function in the best way "justice must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 14 (1954); *In re* Murchison, 349 U.S. 133, 136 (1955).

[145] Stanley v. Illinois, 405 U.S. 645, 656 (1972).

[146] *See supra* note 97.

> an administrative law judge, attached to an agency, is presiding in litigation by that agency against a private party. One can fill the pages of the United States Code with legislation intended to guarantee the independence of the administrative law judge; but so long as that judge has offices in the same building as the agency staff, so long as the seal of the agency adorns the bench on which that judge sits, so long as that judge's assignment to the case is by the very agency whose actions or contentions that judge is being called on to review, it is extremely difficult, if not impossible, for that judge to convey the image of being an impartial fact finder.
>
> A truly competent and impartial administrative judiciary is a precious prize indeed. But even more than a prize, such an administrative judiciary is essential if our administrative justice system is to function successfully under the crushing weight of new legislation and new cases and in the fishbowl environment in which all of government finds itself as we embark upon our third century as a nation.[147]

The authors join with Mr. Segal and the many other distinguished members of the bar who favor the corps concept. We believe that enactment of the Heflin bill will assure the fairness of administrative adjudications and result in more efficient employment of administrative law judges with consequental cost savings to the federal government.

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[147] Segal, *The Administrative Law Judge*, 62 A.B.A. J. 1424, 1426, 1428 (1976).

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SYMPOSIUM ON ADMINISTRATIVE LAW

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The Evolving Role of Administrative Law Judges

Victor W. Palmer[*]

I. INTRODUCTION

Every trial judge in the judicial branch of the federal government has two counterparts performing comparable functions for the executive branch.[1] The latter are entitled administrative law judges.[2]

The Supreme Court's recognition of the functional comparability of administrative law judges[3] has caused the legal community to reexamine their current role. Furthermore, it has given rise to legislative proposals to better enable the administrative judiciary to live up to its potent promise as a relatively inexpensive and efficient mechanism for the adjudication of controversies involving complex scientific and economic issues and the high volume processing of claims by experts, whose fairness and impartiality are beyond question.

The nature of the administrative law judge office and its role within the federal government has changed greatly since 1946, when the first safeguards for its independence were enacted as part of the Administrative Procedure Act (APA).[4] The strengths and weaknesses of the office have since been exposed by time and litigation. The work of the executive branch has changed, as its principal focus has shifted away from the formulation of new policies responsive to new regulatory programs. There is a new emphasis on reliable and even-handed enforcement of existing programs and laws. Furthermore, there are new societal demands for a viable alternative to courts where "speedy trials" are the goal rather than the practice. These developments make this a propitious time for enactment of legislation to eliminate troublesome problems which preclude the realization of the office's full potential.

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[1] *See* Release, *Total Number of ALJs on Board by Grade and Number as of October 22, 1984*, Office of Personnel Management. There are currently 515 authorized United States district judgeship positions as contrasted with 1,119 federal administrative law judges employed by 29 departments and agencies of the executive branch. *Id.*

[2] On March 27, 1978, Congress passed Pub. L. No. 95-251, 92 Stat. 183, amending 5 U.S.C. § 3105, which substituted the term "Administrative Law Judge" for the term "Hearing Examiner" (codified as amended at 5 U.S.C. § 3105 (1982)).

[3] *See* Butz v. Economou, 438 U.S. 478 (1978). The Court stated: "There can be little doubt that the role of the modern federal hearing examiner or administrative law judge . . . is 'functionally comparable' to that of a judge." *Id.* at 513.

This article shall explore the dynamics of the evolutionary changes in the role of administrative law judges that have taken place since our nation's founding and the desirable reforms to be achieved upon enactment of legislation sponsored by Senator Howell Heflin, Representative Dan Glickman, and other members of Congress.

II. HISTORICAL ANTECEDENTS

When the Administrative Procedure Act was enacted in 1946, Congress undertook to bring order out of the chaos of the then existing administrative process. The administrative process, according to legal scholars began in 1789, with the birth of government under the United States Constitution.[5] During that first year, officers were appointed to determine the payment of veterans' pensions and custom officers were authorized to estimate the duties payable on imports.[6] These officers were the probable precursors of today's administrative law judges.[7] In 1838, cases involving ship's hulls and boilers were referred to "inspectors" for decision.[8] Decision-making powers were granted to "registers" of the General Land Office in 1840.[9] The title of "examiners" was first authorized by the Interstate Commerce Commission (ICC) Act of 1906.[10] Within a year, the ICC had appointed eight "special examiners."[11] In 1914, the Federal Trade Commission (FTC) was created by Congress which conferred "authority to employ and fix the compensation of such attorneys, special experts, examiners, clerks, and other employees as it may from time to time find necessary for the proper performance of its duties."[12] Professor Davis advises that the Shipping Act of 1916[13] was "the first to copy this provision, which soon became the prototype for the many regulatory agencies."[14]

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[4] Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 501-559 (1982)). *See* 5 U.S.C. §§ 554, 556, 557, 3105 (1982).

[5] *See* W. Gellhorn, Federal Administrative Proceedings 4-7 (1941); Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 261 (1978).

[6] *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 17.11, at 313 (2d ed. 1980).

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] Pub. L. No. 59-337, 34 Stat. 595 (codified as amended at 49 U.S.C. §§ 11, 18 (1976 & Supp. III 1979) (§ 11 *repealed* 1976)). The Act authorized employment of "special agents or examiners" to administer oaths, examine witnesses, and receive evidence. *Id.*

[11] *See* Davis, *supra* note 6, at 313 (citations omitted).

[12] *Id.*

[13] Shipping Act of 1916, Pub. L. No. 64-240, 39 Stat. 728 (codified as amended at 46

The dynamics that remolded the hearing examiner into a more independent agency functionary, involved the interplay between the concerns of those who advocated increased regulation of the economy and those who feared governmental intrusion into the practices of the American marketplace. The latter decried first the substance and later the form of government regulation.[15]

Through the mid-1930's, the courts were the battlegrounds for substantive due process attacks that effectively thwarted laws to implement social and economic regulation.[16] During this period, opponents of governmental regulation also launched procedural due process attacks on market control mechanisms in response to the shifting of control over decision-making from the judiciary to administrative boards and commissions.[17] The Supreme Court gradually assented to the view that "administrative tribunals were not per se tyrannous."[18] Soon thereafter, the priority and exclusivity of administrative tribunals was established.[19] Finally, for all practical purposes, the Court in *Chicago, B. & O. Ry. v. Babcock*,[20] struck the death knell for arguments that the administrative process was, per se, an inadequate substitute for common law courts.[21]

In the cases which followed, the focus shifted from the choice of forum to the procedures an administrative tribunal should follow and "introduced the

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U.S.C. 801 et. seq. (1982)).

[14] *See* Davis, *supra* note 6, at 313. Davis noted the complete absence in the various statutes creating the regulatory agencies of any idea that the examiner was more than a mere subordinate. *Id.*

[15] *See* Verkuil, *supra* note 5, at 261-62.

[16] *Id.* at 262.

[17] *Id.*

> The Supreme Court distinguished substantive control of private behavior directly from that imposed by the legislature indirectly through administrative bodies. In the latter situation, the administrative structure itself was attacked because it deprived those subject to it of a procedural right to a judicial tribunal. Procedural tyranny, in this view, had a per se effect; it resulted merely from the removal of decision functions from the common-law courts.

Id. (citations omitted).

[18] *Id.* at 263 n.15. *See, e.g.*, Texas S. Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) (doctrine of primary or exclusive jurisdiction articulated; priority granted to administrative jurisdiction); United States v. Ju Toy, 198 U.S. 253 (1905) (deportation decisions within exclusive jurisdiction of immigration authorities).

[19] Verkuil, *supra* note 5, at 263.

[20] 204 U.S. 585 (1907).

[21] *Id.* at 598. The Court's rationale was explained by Justice Holmes:

> The Board was created for the purpose of using its judgment and its knowledge . . . Within its jurisdiction, except, as we have said, in the case of fraud or a clearly shown adoption of wrong principles, it is the ultimate guardian of certain rights. The State has confided those rights to its protection and has trusted to its honor and capacity as it confides the protection of other social relations to the courts of law. Somewhere there must be an end.

Id. The seventh amendment right to a common law jury still restricts the use of administrative tribunals in certain narrow areas. *See* Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442 (1977); Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 338, 340 (1909).

modern era of administrative law."[22] The cases also revealed a concomitant need for presiding officers who could appreciate and expertly apply the particular procedural due process requirements which the courts insisted administrative tribunals observe. From this point on, administrative law judges, initially designated as hearing examiners,[23] had a permanent place in the administrative process.

Outside the courts, other forces were at work which would eventually create a demand for an expanded cadre of expert administrative law judges. In 1906, Roscoe Pound addressed the American Bar Association (ABA) to denounce the prevailing "sporting theory of justice."[24] He argued that various cases then heard by courts, could be more efficiently disposed of by administrative tribunals.[25] Ten years later, the ABA was again the forum for an important, provocative address. Elihu Root, on becoming the ABA president in 1916, called for a systematic study of administrative law.[26]

There followed a period of reflection on this new field of law by leading members of the bar and academia. The scholars focused upon the means by which courts controlled administrative law and the need for reforms establishing safeguards within the internal machinery of the administrative process itself.[27] The trauma of the Great Depression, Franklin D. Roosevelt's election in 1932, and the resulting deluge of regulation, swept away all hopes for the design of administrative procedures based upon careful, systematic study by legal scholars.[28] There were new calls for revival of the adversary system as a result of anti-New Deal sentiment.[29]

In *Crowell v. Benson*,[30] Justice Hughes stated that an administrative hearing was subject to a trial de novo on the jurisdictional facts. In *St. Joseph Stock Yards, Co. v. United States*,[31] Chief Justice Hughes reiterated that judicial power could not be "circumscribed by any legislative arrangement designed to give effect to administrative actions going beyond the limits of constitutional authority."[32] In subsequent cases,[33] the Chief Justice further ruled that a statutory mandate to conduct a full hearing required a hearing patterned after the traditional judicial model, and twice held a rate order of the Secretary of Agriculture to be invalid for deviating from this model.[34]

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[22] Verkuil, *supra* note 5, at 264. *See, e.g.*, Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915); Londoner v. Denver, 210 U.S. 373, 386 (1908).

[23] *See supra* note 2.

[24] Pound, *The Causes of Popular Dissatisfaction With the Administration of Justice*, 29 A.B.A. Rep. 395 (1906), *reprinted in* 57 A.B.A. J. 348 (1971).

[25] Verkuil, *supra* note 5, at 264. Pound's speech shocked the bar of that day. "The ABA was outraged: its members insisted that the system was fine — 'the most refined and scientific system ever devised by the wit of man,' said one association dignitary; the product of 'the wisdom of centuries,' said another." N.Y. Times, April 11, 1976, § 1, at 30, col. 5 *cited in* Verkuil, *supra* note 5, at 265 n.28.

[26] *See* Root, *Public Service by the Bar*, 41 A.B.A. Rep. 355, 368-69 (1916), *reprinted in* 2 A.B.A. J. 736, 749-50 (1916); *cited in* FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 142 n.4 (1940).

[27] *See generally* E. Frankfurter & J.F. Davison, Cases and Materials on Administrative Law V (2d ed. 1935); E. Freund, Cases on Administrative Law VI (2d ed. 1928). *See also* Frankfurter, *The Task of Administrative Law*, 75 U. Pa. L. Rev. 614 (1927); Hughes, *Some Aspects of the Development of American Law*, 39 N.Y. B.A. Rep. 266, 269 (1916); Sutherland, *Private Rights and Government Control*, 42 A.B.A. Rep. 197, 207 (1917); Address of President Guthrie, 46 N.Y. B.A. Rep. 169-86 (1923).

[28] *See* Verkuil, *supra* note 5, at 267.

[29] *Id.*

[30] 285 U.S. 22 (1932).

[31] 298 U.S. 38 (1936).

Growing discontent with the impartiality of the administrative process led Senator Norris, in 1929, to introduce a bill to create a separate administrative court.[35] A succession of bills[36] offering various remedies to the problem, were introduced prior to the passage of the Administrative Procedure Act of June 11, 1946.[37]

Legislation, however, was enacted during this period which would have enduring consequences for the administrative law judge office. The Social Security Act of 1935 created the Social Security Board which established its own set of guidelines for decision-makers in the hearing process.[38] The Board stated that it expected an administrative hearing to be simple, informal, accurate, and fair, and referred to its decision-makers as referees or social agents.[39]

In 1937, President Roosevelt's Committee on Administrative Management recommended complete separation of adjudicative personnel from investigative and prosecutorial personnel.[40] In 1939, President Roosevelt directed the Attorney General to name "a committee of eminent lawyers, jurists, scholars, and administrators to review the entire administrative process . . . and to recommend improvements, including the suggestion of any needed legislation."[41]

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[32] *Id.* at 52-53. The scope of de novo review, however, was modified to permit it to be "performed in the light of the proceedings already had . . . aided by the sifting procedure of an expert legislative agency." *Id.*

[33] Morgan v. United States, 304 U.S. 1 (1938); Morgan v. United States, 298 U.S. 468 (1938).

[34] Morgan v. United States, 304 U.S. 1, 22 (1938). The Court stated: "[I]f these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play." *Id.*

[35] S. 5154, 70th Cong., 2d Sess., 70 CONG. REC. 1030-33 (1929).

[36] S. 1835, 73d Cong., 1st Sess., 77 CONG. REC. 4962 (1933); S. 3787, H.R. 12297, 74th Cong., 2d Sess., 80 CONG. REC. 782 (1936); S. 3676, 75th Cong., 3d Sess., 83 CONG. REC. 3539 (1938); H.R. 6324, H.R. 4235, H.R. 4236, S. 915, S. 916, 76th Cong., 1st Sess. (1939); S. 674, S. 675, S. 918, H.R. 3464, H.R. 4238, H.R. 4782, 77th Cong., 1st Sess. (1941); H.R. 4314, H.R. 5081, H.R. 5237, S. 2030, 78th Cong., 2d Sess. (1944); H.R. 1203, S. 7, 79th Cong., 1st Sess. (1945).

[37] *See supra* note 4.

[38] Social Security Act, Pub. L. No. 271, ch. 531, 49 Stat. 620 (1935) (current version at 42 U.S.C. §§ 301-06 (1970 & Supp. V)). *See* A. ALTMEYER, THE FORMATIVE YEARS OF SOCIAL SECURITY (1966); Liebman, *The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of Social Welfare Estates*, 89 HARV. L. REV. 833 (1976).

[39] *See* SOCIAL SECURITY BOARD, BASIC PROVISIONS ADOPTED BY THE SOCIAL SECURITY BOARD FOR THE HEARING AND REVIEW OF OLD-AGE AND SURVIVORS INSURANCE CLAIMS, S. Doc. No. 10, 77th Cong., 1st Sess. 33, 35-38 (1941).

[40] Report of the President's Comm. on Admin. Mgmt., Admin. in the Gov't. of the United States (1937).

[41] *See* Wong Yang Sung v. McGrath, 339 U.S. 33, 38-39 (1950) (quoting President Roosevelt's message to Congress). The demand for reform, however, was so intense "that Con-

In 1941, the Attorney General's Committee on Administrative Procedure published its final report.[42] The report made clear that the central problem with the administrative process was a lack of definition to the hearing officer's role.[43] The primary concern was the hearing officer's ability to remain impartial.[44]

The Committee went on to recommend specific reforms respecting appointment, tenure, and salary, stating that: "These officials should be men of ability and prestige, and should have a tenure and salary which will give assurance of independence of judgment . . . and be removable only upon formal charges of fraud, neglect of duty, incompetence, or other impropriety."[45] A minority of the Committee recommended further, that hearing officers be established as a separate corps, not attached to specific agencies.[46] The minority report criticized the majority for attempting to achieve needed independence through internal separation of functions, pointing out the problems that must arise when investigators, prosecutors and hearing officers are all subject to the same superior. The minority urged, as a minimum, that the majority plan "be confined to those situations where complete separation of functions is impossible."[47]

III. The Administrative Procedure Act

The Administrative Procedure Act was finally enacted on June 11, 1946.[48] World War II had delayed any action on the 1941 final report by the Attorney General's Committee on Administrative Procedure. The bill that was ultimately passed by Congress appeared on its face to be a triumph by the minority over the majority of the Committee.[49] The provisions, however, giving

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gress did not await the Committee's report but passed what was known as the *Walter-Logan* bill, a comprehensive and rigid prescription of standardized procedures for administrative agencies." *Id.* at 38. *See* Verkuil, *supra* note 5, at 278. The bill was vetoed by President Roosevelt, 86 Cong. Rec. 13942-3 (1940), and sustained by the House, 86 Cong. Rec. 13953 (1940), due to the unexpected complexity of the task. *See* Verkuil, *supra* note 5, at 277-79.

[42] Report of the Committee on Administrative Procedure, *reprinted in* S. Doc. No. 8, 77th Cong., 1st Sess. (1941). The Committee's report was ultimately accepted by President Roosevelt as "a great document of permanent importance." *See Legislative History of the Administrative Procedure Act*, S. Doc. No. 248, 79th Cong., 2d Sess. 189 (1946).

[43] *Id.*

[44] *Id.* at 46.

[45] *Id.*

> The Committee is impressed also with the fact that where agencies have recognized the importance of hearing officers in the salaries paid, in the independence of view encouraged and accorded, and in the importance given to their decisions, the positions have attracted and held men whose ability and fairness have been recognized by the bar and the public. Where the opposite has happened, progressive decline has occurred. The agency heads have not had confidence in the ability of the officials, and with that the compensation and lack of responsibility have precluded men of sufficient ability to reverse the trend from accepting the positions.

Id.

[46] *Id.* at 47.

[47] *Id.* at 208-09.

[48] *See supra* note 4.

[49] *See Verkuil, supra* note 5, at 277-78.

examiners independence and security in their tenure and compensation were the result of compromise. Instead of establishing the examiners as an independent corps, as recommended in the minority report, the responsibility for protecting critical elements in the employment of hearing examiners was entrusted to the Civil Service Commission.

Under the APA, administrative law judges are appointed and employed by the individual agencies whose cases they hear.[50] Agency selection of administrative law judges, however, must be made in accordance with the Civil Service System for merit appointments, now administered by the Office of Personnel Management (OPM). Examiners' compensation is also prescribed by OPM independently of agency recommendations or ratings. Once appointed, ALJs may only be removed by an agency for good cause, established and determined by the Merit Systems Protection Board, on the record, after an opportunity for hearing before the Board.[51]

Additionally, cases must be assigned to ALJs in rotation, as far as practicable.[52] No party may consult with an ALJ ex parte concerning a fact at issue in a hearing.[53] Administrative law judges may not be held responsible to, supervised by, or directed by anyone who performs investigative or prosecutorial functions for the employing agency.[54] The APA also precludes their performance of duties inconsistent with their duties as administrative law judges.[55]

The judicial nature of the hearings ALJs conduct was established by the APA's prescription for hearings in which the ALJs administer oaths and affirmations, issue subpoenas, rule upon offers of proof, and receive relevant evidence. Furthermore, every party has a right to appear with counsel, to present oral and documentary evidence, and to conduct cross-examination. Initial and recommended decisions by ALJs are, under the APA, part of the record, and the final agency rule, order or sanction must be based on the whole record and be in accordance with the reliable, probative and substantial evidence.[56]

The APA would later be amended and modified in a number of important respects,[57] but the underlying prescription for the office of hearing examiner, later administrative law judge, embodied in these initial provisions would endure.[58] Under the initial provisions of the APA, administrative law judges became the only government officers, aside from agency heads or officials provided under other specific statutes, authorized to conduct hearings in rulemaking or adjudicative proceedings.[59] Thirty two years later, when the Supreme Court proclaimed the "functional comparability" of administrative law judges to trial judges, its conclusion was based upon these provisions of the APA which protect the independence of the administrative law judge and the integrity of the process.[60]

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[50] 5 U.S.C. § 3105 (1982).

[51] 5 U.S.C. § 7521 (1982).

[52] 5 U.S.C. § 3105 (1982).

[53] 5 U.S.C. § 554(d) (1982).

[54] *Id.*

[55] 5 U.S.C. § 3105 (1982).

[56] 5 U.S.C. §§ 556-57 (1982).

[57] *See, e.g.*, The Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 378 (1966) (considered a major amendment of the APA).

[58] Various legislative proposals were advanced during the Carter Administration to drastically change the selection and tenure of administrative law judges. Senate Bill 262, introduced on January 31, 1979, as an omnibus bill on regulatory reform by Senator Ribicoff, would have limited administrative law judge appointments to renewable ten year terms with authority to establish and administer performance standards and qualifying standards placed in a politically appointed Administrator of a re-constituted Administrative Conference. Under S. 262, agencies would have been allowed to choose from the top ten eligibles on registers prepared by ACUS without reference to veterans preference. S. 755, introduced on March 26, 1979 on behalf of the Carter Administration, duplicated the ALJ provisions of S. 262 except that it proposed seven year terms. S.

IV. THE CIVIL SERVICE COMMISSION AND THE DISCHARGE OF ITS DUTIES UNDER THE APA

A. *Overview*

Despite the provisions designed to safeguard the independence of adminis-

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2147 (Part C), introduced on December 18, 1979, by Senator Culver would have shifted responsibility for recruitment, pay and selection of administrative law judges to the Chairman of ACUS and provided for salaries at the GS-16, 17, and 18 pay grades; it would also have authorized agencies to select from the top ten eligibles on registers prepared by the ACUS Chairman. The omnibus regulatory reform bills in the House were H.R. 3263 and H.R. 6768. The latter bill, introduced on March 11, 1980, by Representative Hanley, would have imposed seven year terms but retained selective certification and veterans preference, allowing an agency to select from a list of five or more eligibles. H.R. 6768 would have vested in the Chairman of ACUS authority to establish a performance appraisal system and to evaluate the qualifications and file complaints against administrative law judges. H.R. 6768 would have also transferred authority over recruitment, examination, selection, classification and pay of administrative law judges from OPM to the Chairman of ACUS. Additionally, Representative Glickman offered an amendment to H.R. 3263 which called for a study by ACUS of the feasibility of establishing administrative law judges as a separate corps.

[59] R. Fuchs, *The Hearing Examiner Fiasco Under the Administrative Procedure Act*, 63 HARV. L. REV. 737, 739 (1950).

[60] *See* Butz v. Economou, *supra* note 3 at 513-14.

> [F]ederal administrative law requires that agency adjudication contain many of the same safeguards as are available in the judicial process. The proceedings are adversary in nature. They are conducted before a trier of fact insulated from political influence. A party is entitled to present his case by oral or documentary evidence, and the transcript of testimony and exhibits together with the pleadings constitute the exclusive record for decision. The parties are entitled to know the findings and conclusions on all of the issues of fact, law, or discretion presented on the record.
>
> There can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is 'functionally comparable' to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions. More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency.
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> . . . .
>
> Since the securing of fair and competent hearing personnel was viewed as 'the heart of formal administrative adjudication,' the Administrative Procedure Act contains a number of provisions designed to guarantee the independence of hearing examiners.

Id.

trative law judges, the concerns initially voiced by the minority of the Attorney General's committee would come back to haunt the administrative process. In permitting the examiners to be appointed by, and serve as the employees of individual agencies, the door was open to the domination of examiners by agencies clearly antithetical to their judgmental independence. The protective buffer was to be the Civil Service Commission,[61] which, under section 11 of the APA, was charged with supervision of the selection process and the administration of the APA's features for safeguarding their tenure. The Civil Service Commission often failed to appreciate the crucial nature of its duties and responsibilities under the APA, and during various times of crisis, yielded to pressures applied by outside forces. Initially, it allowed itself to be a vehicle for McCarthyist hunting for "leftist-thinking" incumbents.[62] Later, the Civil Service Commission and its successor organizations would actively cooperate with agencies seeking to treat the APA's new hybrid[63] decision-maker as simply another agency employee.

Over the years, tensions between administrative law judges, their agency employers and the Civil Service Commission itself, have hindered the administrative process. On balance, these tensions have been largely the result of a shared institutional resistance on the part of agency heads and Civil Service Commission functionaries to agency decision-makers who are legally and ethically unable to implement agency policy communicated through internal memoranda and staff conferences. Whatever else sets ALJs apart from other agency employees is insignificant compared to their obligation under the APA to render decisions based on evidence of record, and to avoid prohibited ex parte communications with interested agency employees.[64] The shifting of caseloads from the quasi-legislative type where initial policy is formed by agencies, to those involving claims, and adversarial proceedings where the agency is more often a party enforcing a fully developed policy, has heightened the frictions caused by this special characteristic of an administrative law judge.

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[61] The Civil Service Commission (CSC) was replaced by the Office of Personnel Management (OPM) and the Merit System Protection Board (MSPB). Reorganization Plan No. 2 of 1978, 43 F.R. 36037, 92 Stat. 3783; Pub. L. 95-454, Oct. 13, 1978, 92 Stat. 1121. The Civil Service Regulations pertaining to administrative law judges are found at 5 C.F.R. §§ 930.201-930.215 (1984).

[62] *See* Thomas, *The Selection of Federal Hearing Examiners: Pressure Groups and the Administrative Process*, 59 YALE L. REV. 431, 434 (1949).

[63] This term was coined by Thomas C. Mans to describe the status of administrative law judges under the APA. *See* Mans, *Selecting the 'Hidden Judiciary': How the Merit Process Works in Choosing Administrative Law Judges* (Parts I & II), 63 JUDICATURE 60, 130 (Aug. & Sept. 1979).

> The APA sought to harmonize conflicting demands on administrative agencies. Demands for flexible, rapid, and expert policy development and application were frequently in conflict with demands that the agency honor the norms of the common-law legal culture. The compromise produced a hybrid that charts a middle path between these conceptions. Administrative law judges were not removed from the agencies and the APA did not deny the value of specialization and expertise in the adjudicative process. Yet the APA did reform the status of the ALJ and give judge-like quality to the position.

Id. at 130.

[64] *See supra* notes 53 and 56 and accompanying text.

The American Bar Association's presence has largely been a positive influence in the history of the administrative law judge, but only after a dismal beginning. Initially, it cooperated with post-war witch hunters who wished to oust "leftist-thinking" incumbents.[65] Later, the ABA would encourage the Civil Service Commission to protect hearing examiners and fulfill its function as a guardian of their independence. The Administrative Conference of the United States (ACUS), created in 1961, became an impetus for needed reforms by the Civil Service Commission and the agencies.[66] Administrative law judges themselves organized to protect their individual rights, and to voice their concerns regarding the removal of the barriers to the proper performance of their duties.[67] As Professor Victor Rosenblum recently testified, however, all commitments by the Civil Service Commission to better discharge its duties have eventually been "followed by witherings, abandonments, and abortions of the efforts."[68]

B. The Hearing Examiner Fiasco

As its very first function under section 11 of the APA, the Civil Service Commission ordered the firing of over 25 percent of the 212 incumbent hearing examiners then employed by federal agencies.[69] One commentator labeled the episode "the hearing examiner fiasco" and charged that the Civil Service Commission had "permit[ted] itself to be pushed first in one direction and then in another by outside pressures . . . ."[70]

Under the APA, the selection of the hearing examiners was not to start until June 11, 1947. The Commission prepared itself for the discharge of its responsibility by appointing a committee consisting of staff personnel and the Chairman of the ABA's Section of Administrative Law.[71] The ABA applauded this decision as a "signal victory" in an article entitled *Victory as to the Hearing Examiners: Association's Contentions Sustained as to New*

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[65] *See supra* note 62.

[66] The Administrative Conference was established in March 1961 as a temporary conference by Executive Order of President Kennedy. *See* Exec. Order No. 10934, 3 C.F.R. 464 (1959-1963 Comp.). It was disbanded after 18 months. The permanent Administrative Conference of the United States (ACUS) was finally organized in January 1968 pursuant to The Administrative Conference Act of 1966. 5 U.S.C. §§ 571-76 (1982).

[67] There are three organizations which principally represent the interests of federal administrative law judges. The Federal Administrative Law Judges Conference (FALJC) which presently has nearly 800 members and represents judges in each of the 29 federal agencies that hold hearings conducted by administrative law judges; The National Conference of Administrative Law Judges which is a constituent of the ABA's Judicial Administration Division and includes both federal and state administrative law judges as members; and The Association of Administrative Law Judges, Inc., which represents the nearly 800 administrative law judges employed at the Social Security Administration.

[68] *See Administrative Law Judge Corps Act: Hearings on S. 1275 Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 98th Cong. 1st Sess. 264 (1983).

[69] *See* Thomas, *supra* note 62, at 431 & 442.

[70] *See* Fuchs, *supra* note 59, at 767.

[71] *See* Thomas, *supra* note 62, at 434-35.

Rules.[72]

The Civil Service Commission first undertook to examine all incumbent hearing examiners. To aid in this project, it appointed a Board of Examiners to develop standards and "to make a complete qualifications investigation of the incumbents . . . to determine the manner in which they have discharged their duties and responsibilities in the positions now held by them as well as in previous positions."[73]

The Board of Examiners included members of the ABA who would later be charged with bias, prejudice, nepotism and favoritism.[74] On March 11, 1949, the results of examinations conducted by the Board were announced. Of 212 incumbents rated, 54, or 25 percent, were disqualified.[75] In addition, some incumbents found qualified by the Board were qualified at lower grades than they then held, thereby blocking their continued employment by the agency.[76]

Examiners at NLRB who were accused by informants of being pro-labor were disqualified.[77] This disqualification resulted in such devastating effects on the NLRB, that the Board pleaded for reconsideration.[78] Protests followed, and, on August 24, 1949, Public Law 266 was enacted to preclude persons who had appeared within the prior two years in any proceedings conducted by agency examiners, from serving as members of a Civil Service Commission Board which would pass upon the qualifications of those agency examiners.[79] Eventually, the Civil Service Commission bowed to the various protests and "almost all status incumbents . . . succeeded in gaining permanent appointments."[80] Professor Fuchs, who had been a member of the Attorney General's

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[72] 33 A.B.A. J. 861 (1947). The ABA had apparently fallen victim to sentiments best exemplified by its publication of the following passage from a letter to the Civil Service Commissioner from Senator Wiley, the 1947 Chairman of the Senate Judiciary Committee, quoted in Thomas, *supra* note 62, at 435.

> It seems to me that the burden of proof is on the United States Civil Service Commission that these hearings [sic] examiners will not be men of leftist thinking, men who don't have complete loyalty to our constitutional system of checks and balances, men who are not devoted to our system of private enterprise . . . . I shall be looking for substantial proof that the Civil Service Commission is going to fill these quasi-judicial posts with men of the highest unimpeachable caliber of the legal profession available, rather than with men who simply have occupied similar positions in the Federal Government today, who largely are of one party and who may lack the approach of private enterprise in their work.

Id.

[73] See Thomas, *supra* note 62, at 436 n.21.

[74] *Id.* at 447 n.55.

[75] *Id.* at 442.

[76] *Id.* at 442-43.

[77] *Id.* at 452-53.

[78] *Id.* at 444.

> The action has eviscerated the hearing examiner staff at a time when its case load is singularly great. 14 out of 28 members of the agency's old and experienced staff, including both status and war service incumbents have been rejected. The Board will be unable efficiently to pursue its regular operations without the services of these trained men, many of whom have been with the Board for over a decade.

Id. (quoting "Notice of Agency Request for Reconsideration and Appeal" (March 24, 1949)).

[79] *See also* Thomas, *supra* note 62, at 456-57.

[80] *See* Fuchs, *supra* note 59, at 759.

Committee on Administrative Procedure, urged the Civil Service Commission to solve "its over-all personnel problem in the light of the Hoover Commission's recommendations."[81]

C. *The* Ramspeck *Case*

On September 21, 1951, the Civil Service Commission issued revised regulations for classifying hearing examiners at five separate grades, condoning the separation of hearing examiners pursuant to agency reduction-in-force actions and permitting agencies to make conditional appointments in emergencies. Prior to this action, at the urging of members of the ABA and Civil Service Commissioner Fleming, hearing examiners formed their own professional association. Its purpose was to "provide a medium for making known to the Commission and its Advisory Committee the points of view of the 'journeyman' trial examiners."[82] On December 14, 1951, this Conference, through its officers and a group of individual hearing examiners, sued in the United States District Court for the District of Columbia to have the new regulations declared invalid.[83]

The United States District Court found the lawsuit to be meritorious and granted a permanent injunction against enforcement of all but the regulation permitting conditional appointments during emergencies.[84] In a per curiam opinion, the Court of Appeals for the District of Columbia Circuit affirmed.[85] The Supreme Court reversed the District of Columbia Circuit in a split decision.[86] In reversing the lower courts, the majority sanctioned the right of the Civil Service Commission to classify "the examiners into grades, with salaries appropriate to each grade, . . . in each federal agency using examiners."[87] The Court conceded that wholly subjective specifications had been used by the Commission in classifying the different grades on the basis of whether the cases heard by the examiners were "moderately difficult and important, difficult and important, unusually difficult and important, exceedingly difficult and important, or exceptionally difficult and important."[88] Nonetheless, these standards were upheld.

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[81] *Id.* at 765-67. The original Hoover Commission's 1949 report to Congress contained no specific reference to hearing examiners. Instead, it articulated generalized concerns respecting the way in which all civil servants were being recruited and retained, and it called for better salaries and improvements in Civil Service Commission administered examination procedures and recruitment practices to encourage the best people to apply for government positions and, once employed, to stay in government service. *See Report to the Congress by the U.S. Commission on Organization of the Executive Branch of Government*, May 1949.

[82] *Jair S. Kaplan*, "F.A.L.C. 35 Years After: A Short History of the Federal Administrative Law Judges Conference," circulated on the occassion of the Conference's 35th anniversary during a seminar it conducted on March 16, 1982, at Host Farms, Lancaster, Pennsylvania (available in the offices of the New England Law Review). Judge Kaplan is a past president of the Conference.

[83] *Id.*

[84] Federal Trial Examiners Conf. v. Ramspeck, 104 F. Supp. 734 (D.D.C. 1952).

[85] Ramspeck v. Trial Examiners Conf., 202 F.2d 312 (D.C. Cir. 1952).

[86] Ramspeck v. Trial Examiners Conf., 345 U.S. 128 (1953) (Black, Frankfurter, and Douglas, JJ., dissenting).

[87] *Id.* at 135.

[88] *Id.* at 136-37.

Thus, agency employers were allowed to "decide if there is a vacancy to be filled, and . . . [whether] this vacancy is to be filled by promotion from among the present examiners."[89] Furthermore, the requirement of the APA that "examiners shall be assigned to cases in rotation so far as practicable"[90] was interpreted as permitting assignments on the basis of "the experience and ability of the examiner available."[91] Under the majority opinion, agencies were further permitted to discharge administrative law judges "for lack of funds, personnel ceilings, reorganizations, decrease of work and similar reasons" through "reduction-in-force" actions which the majority construed to be removals from office "for good cause"[92] within the meaning of the Act.[93] Justice Black filed a vigorous dissent stating: "I agree with the District Court and the Court of Appeals that the regulations here sustained go a long way to frustrating the purposes of Congress to give examiners independence."[94]

D. *In the Wake of* Ramspeck

Reviewing the impact of *Ramspeck*, former Chairman of the Civil Service Commission, John W. Macy, Jr., concluded that the decision failed to resolve "the question of the status of hearing examiners so far as the law was concerned."[95] On December 15, 1954, President Eisenhower's appointed Conference on Administrative Procedure transmitted to the Civil Service Commission a set of recommendations developed by its Committee on Hearing Officers.[96] The recommendations were that: the hearing examiner program be administered by a special five-person bureau within the Civil Service Commission consisting of at least two lawyers expert in administrative law; high qualification standards for hearing examiners be maintained; the Civil Service Commission's career-merit system be retained on the basis of open competitive recruiting and appointments made from a competitive register or by promotion, transfer, or reinstatement of previously qualified hearing examiners; "one or more" salary grades for hearing examiners be established in each agency with pay fixed at the GS-13 through GS-15 levels[97] until higher grades become available; classification standards be revised to delete all reference to the size of the hearing record as a factor affecting the examiner's pay grade; and, steps be implemented to obtain hearing transcripts at lower cost.[98]

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[89] *Id.* at 138.

[90] APA. § 11, Law of June 11, 1946, ch. 324, 60 Stat. 237, 244, *repealed by* Pub. L. No. 89-554, 80 Stat. 378 (1966) (provisions incorporated in 5 U.S.C. §§ 551-59 (1982)).

[91] *Ramspeck*, 345 U.S. at 139-40.

[92] *See supra* note 90.

[93] *Ramspeck*, 345 U.S. at 142-43.

[94] *Id.* (Douglas, Frankfurter, JJ., concurring).

[95] J.W. Macy, *The APA and the Hearing Examiner*, 27 FED. B.J. 351, 374 (1967).

[96] Report of the Conference on Administrative Procedure called by the President of the United States on April 29, 1953 (transmitted by Judge E. Barrett Prettyman, Chairman, with letter dated December 15, 1954).

[97] Under *Ramspeck* as many as five levels at GS-11 to GS-15 were to be maintained under the Civil Service Commission regulations that were before the Court. *Ramspeck*, 345 U.S. at 136-37.

[98] *See supra* note 96.

The Civil Service Commission readily acceded to the Eisenhower Conference's recommendations that it continue those practices already in effect.[99] It also agreed to implement, as soon as possible, the recommended three-grade system of pay classification and to discontinue its use of transcript length as a classification factor.[100]

In 1955, the Second Hoover Commission,[101] in one of its nineteen reports to Congress, included a proposal by its Task Force on Legal Services and Procedures for an independent Administrative Court of the United States.[102] Although the reports resulted in a number of bills which would have stripped the Civil Service Commission of its authority over the appointment, compensation, and removal of hearing examiners, none were enacted.[103]

The Administrative Conference of the United States, established by President Kennedy as a temporary conference with an eighteen month lifespan, submitted its final report in 1962.[104] Civil Service Commissioner Macy later related that:

> The Conference, relying on information given it by the Civil Service Commission regarding future plans for administration of the hearing examiner program recommended that the Civil Service Commission continue to administer the hearing examiner program subject to continuous observation and study by any successor organization to the Conference; that there be not more than two grades for hearing examiners in the Government and only one grade per agency; that there be a substantial and prompt increase in the compensation of hearing examiners; that candidates for

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[99] *Macy*, *supra* note 95, at 375.

[100] *Id.*

[101] TASK FORCE ON LEGAL SERVICES AND PROCEDURE, REPORT ON LEGAL SERVICES AND PROCEDURE (1955).

[102] *Id.* at 246-50. The underlying report by the Task Force on Legal Services and Procedure, *see supra* note 101, justified its proposal as follows:

> The administrative process has led to a substantial modification of the traditional doctrine of the separation of powers. In special areas of regulation, executive and judicial powers have been combined in a single instrumentality. Commingling of functions in such areas has been found by the Congress to be necessary to the effective performance of the regulatory responsibilities of the executive branch.
>
> As a matter of principle, however, certain functions, such as the imposition, remission, or compromise of money penalties, the award of reparations or damages, and the issuance of cease and desist orders, all of which are typical judicial remedies, should be transferred to the courts where no harm will be done thereby to the regulatory process.
>
> Where such functions may not readily be imposed upon the existing courts of general jurisdiction, but should nevertheless be removed from administrative control, the task force proposes that they be placed in a court of special jurisdiction. To this end, the task force is recommending the establishment of an Administrative Court of the United States to serve as a trial court for such matters of special adjudication.

Id. at 33.

[103] *See* Macy, *supra* note 95, at 375.

[104] *See* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, SUMMARY OF THE ACTIVITIES OF THE CONFERENCE, S. DOC. NO. 24, 88th Cong., 1st Sess. vii (1963). *See supra* note 66.

> hearing examiner positions be evaluated on the basis of training and experience and oral and written examinations, with lawyers of outstanding ability and experience participating in the evaluation of their qualifications; that the resulting register of eligibles be unranked, all initial appointments as hearing examiner to be made from the register and to be probationary; and that agencies develop techniques and conditions to encourage greater professional pride and sense of service among hearing examiners.[105]

The Administrative Conference's recommendation that the hearing examiner program continue to be administered by the Civil Service Commission was the result of protracted negotiation with the Commission.[106] The recommendation was made despite a detailed critique of the Civil Service Commission's operation of the program, prepared for the Administrative Conference by the staff director of its Committee on Personnel. The Director concluded that from "1947 until 1962, the Civil Service Commission had sufficient time to demonstrate it could handle the program. It demonstrated that it could not."[107] However, the Administrative Conference feared that removal of the program from the jurisdiction of the Civil Service Commission might leave it "an orphan unit in the executive branch and in the congressional committees."[108] Accordingly, as Macy reported, when the Civil Service Commission admitted past inadequacies and promised future improvements, a compromise was achieved and the Administrative Conference issued a resolution embodying its terms.[109]

From 1947 until 1964, the Civil Service Commission standards for administrative law judge positions did not require bar membership, rather, six years of experience in legal proceedings was required. In 1964, the Commission issued new standards in accordance with the Advisory Committee's recommendation that bar membership be required in addition to seven years of qualifying experience. Candidates for the position were additionally required to submit to oral and written examinations, with lawyers participating in the evaluation of their qualifications.[110] In 1970 the Commission adopted a recommendation of the Administrative Conference to accept trial experience in substitution for experience in administrative law.[111] Pay grades and salaries, however, remained unchanged.

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[105] *See* Macy, *supra* note 95, at 376 (footnote omitted). *See also* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, *supra* note 104, at 10, 57-58.

[106] *See* testimony of Professor Victor G. Rosenblum, *supra* note 68, at 194-95.

[107] *Id.* at 195 (quoting Lester, Report on Section 11 Hearing Examiners, to the Committee on Personnel, Administrative Conference of the United States at 28 (Aug. 23, 1962)) (unpublished).

[108] *Id.*

[109] *See* Rosenblum, *supra* note 68, at 195. Resolution 28-7 of the Administrative Conference of 1962 stated:

> It is recommended that (a) The hearing examiner program continue to be administered by the Civil Service Commission under the following commitments made by the Commission; the program be administered by a separate office or combined with the administration of a legal career service; that there be an advisory committee composed predominantly of lawyers of distinction; and that the evaluation of candidates for a hearing examiner register of eligibles include a written and an oral competitive examination. (b) Any successor organization to the Conference have as a part of its normal functions the continuous observation and periodic study of the policies and administration of the hearing examiner program.

Id. For a discussion of the consequences of these recommendations, see Macy, *supra* note 95, at 376-77.

In 1971, the President's Advisory Council on Executive Organization (Ash Council) released a new report calling for the establishment of an administrative court.[112] This court, as proposed, was to have appellate jurisdiction over cases from the transportation, securities, and power agencies, to relieve the burden upon federal circuit courts. The Ash Council also concluded that the administrative adjudicatory process had "unduly prolonged proceedings and nurtured high case backlogs leading to ineffective uses of agency resources," and unjustly burdened the parties.[113] Furthermore, the Ash Council concluded that the agency practice of entrusting the review function to a staff group tended to demoralize the hearing officer who was thereby made to feel subordinate. The Council proposed that these problems be remedied by placing a greater share of the responsibility for individual case determinations on the hearing examiner and freeing administrators to concentrate on generic policy formation.[114]

In August 1972, the Civil Service Commission acceded to recommendations by Justice Tom Clark, the Attorney General, and the Administrative Conference of the United States, and changed the title "hearing examiner" to "administrative law judge."[115] A year later, the Commission sponsored a major fact-finding study on the ways administrative law judges were employed by agencies. The study group was chaired by the Deputy General Counsel of the Civil Service Commission, Philip LaMacchia, a past administrative law judge. The other eleven members consisted of six chiefs and five administrative law judges. Although the "LaMacchia Committee" was without power to change the legal consequences of *Ramspeck*, it reexamined the premises that guided the Civil Service Commission on the course that embroiled it in the *Ramspeck* litigation years earlier.

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[110] United States Civil Service Commission: Report of the Committee on the Study of the Utilization of Administrative Law Judges, July 30, 1974 (available in the offices of the New England Law Review).

[111] *Id. See* Administrative Conference of the United States, Recommendation 69-9, 1 C.F.R. 305.69-9 (1984).

[112] *President's Advisory Council on Executive Organization, A New Regulatory Framework*, 53 (1971).

[113] *Id.* at 21-22, 49. For a more detailed discussion of the Ash Council proposals, see Noll, Reforming Regulation: An Evaluation of the Ash Council Proposals 10 (1971); Marquandt & Wheat, *The Developing Concept of an Administrative Court*, 33 Ad. L. Rev. 301, 308-09 (1981). Marquandt and Wheat also proposed that an administrative court should be created. The January 1977 Report of the Department of Justice Committee on Revision of the Federal Judicial System, *The Needs of the Federal Courts* §§ 7-11 (1977) (report by so-called Bork Committee, proposed that Non-Article III tribunals be created which "could consist of an Article I trial division . . . and an administrative court of appeals. The trial division could serve the function now served by administrative law judges . . . ." *Id.*).

[114] *Id.*

[115] *See* Kaplan, *supra* note 82, at 5. *See also* Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 Ad. L. Rev. 109, 110 n.8 (1981). The title change was later confirmed by Congress. *See supra* note 2.

E. The LaMacchia Committee Study

The LaMacchia Committee began its study in 1973, reviewing current literature, case law and government statistics. Personal interviews were conducted with every chief administrative law judge, representatives of every federal agency where administrative law judges were employed, and numerous government and private attorneys who customarily practiced before the judges. In addition, questionnaires were sent to the 800 administrative law judges then employed by federal agencies, to all of the agencies where they were employed, to 700 government attorneys, and to 150 attorneys in private practice. Specific responsibility for developing facts and conclusions on various aspects of administrative law judge employment was divided among nine subcommittees. One year later, on July 30, 1974, the LaMacchia Committee issued a report containing numerous conclusions on the actual conditions of administrative law judge employment.[116]

The report was later reviewed by a second-level committee known as the Advisory Committee on Administrative Law Judges. In 1978, this Committee limited its recommendations to the appointment process.[117] The importance of the LaMacchia Committee study, however, transcends subsequent treatment by the Advisory Committee and the Civil Service Commission. For the first time, the employment of administrative law judges was studied and reported by people with actual knowledge of the everyday operation of the administrative process. The data they compiled led to major findings and conclusions concerning: (1) appointment, pay, and working conditions; (2) the desirability of establishing administrative law judges as an independent corps; (3) problems associated with agency review; and, (4) the feasibility of evaluating the performance of individual administrative law judges.[118]

1. Appointment, Pay, and Working Conditions

The LaMacchia Committee explained the procedures of the Civil Service Commission for recruiting and selecting qualified candidates for appointment by the agencies as administrative law judges.[119] As in 1974, there are presently two pay classifications at which administrative law judges, other than chief administrative law judges, may be appointed, GS-15 and GS-16.[120] Accordingly, two registers of qualified eligibles are developed and maintained. Under the "rule of three",[121] agencies must select an appointee from among the three highest ranking eligibles on the pertinent register.[122] Furthermore, the Office of Personnel Management, following a policy initiated by CSC in 1951, permits agencies to appoint eligibles who are not at the top of a register on the basis of specialized experience under a procedure called selective certification.[123]

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[116] *See supra* note 110.

[117] Final Report of the Advisory Committee on Administrative Law Judges (February 14, 1978).

[118] *See infra* notes 119-41 and accompanying text.

[119] These procedures were described at pages 7-14 of the LaMacchia Committee report. More recent and accessible descriptions are contained in Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 AD.L.REV. 109 (1981); *Federal Administrative Law Judge Hearings, Statistical Report for 1976-1978* at 9-13 (ACUS-July 1980); Mosher, *Here Come the Administrative Law Judges*, National Journal, July 28, 1979, at 1247.

[120] Chief administrative law judges at some agencies are appointed to the GS-17 pay grade. Pursuant to Exec. Order No. 12496, 50 Fed. Reg. 211, 213 (1984), the range of salary for each grade is: GS-15/$52,262 to $67,940; GS-16/$61,296 to $77,640; GS-17/$71,804 to $81,376. 5 U.S.C. § 5308 provides that no salary under the GS or General Pay Schedule may exceed the rate

To qualify as an eligible, an applicant must be an attorney with seven or more years of experience, including two years of recent experience as a judge or as a lawyer engaged in the litigation or preparation of administrative law cases, or cases before appellate courts or courts of unlimited and original jurisdiction.[124] To gather information on an applicant's professional qualifications, written questionnaires known as "vouchers" are sent to about twenty supervisors, judges, law partners, co-counsel and opposing counsel whom the applicant has identified as having personal knowledge of the applicant.

The practice of the Civil Service Commission and the Office of Personnel Management has been to assign an applicant a tentative grade, on a scale of 100, based upon a review of the completed application which includes samples of legal writing, and the voucher responses. Those scoring 80 points or better are rated as tentatively eligible and invited to take a supervised written examination in which the applicants are required to prepare a sample opinion. As a final examining technique, applicants participate in an oral interview before a panel composed of an official of the Office of Personnel Management, a practicing attorney, and an official of an administrative agency.[125]

These practices were found to be generally acceptable by the LaMacchia Committee. Limitations placed upon the use of selective certification were recommended, however, because it tended to promote agency in-breeding and acted as a disadvantage to attorney applicants without specialized experience.[126] The Committee also recommended that the voucher system be replaced by an

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for Level V of the Executive Schedule, which pursuant to Exec. Order No. 12496 is $68,700. As a practical matter, administrative law judges appointed at GS-16, therefore, within several years of appointment receive the identical $68,700 per annum salary paid GS-17 chief judges.

[121] *See* 5 U.S.C. § 3318 (1982).

[122] *See* 5 U.S.C. §§ 2108, 3309, 3317, 3318 (1982). Pursuant to the Veterans Preference Act, the ranking of "preference eligible" veterans is enhanced. *Id.*

[123] *See LaMacchia Committee Report, supra* note 104, at 11.

[124] ACUS Recommendation 69-9, 1 C.F.R. 305.69-9 (1984) (liberalized prior standard).

[125] *See* Lubbers, *supra* note 115, at n.23. Footnote 23 of the Lubbers article states: "The attorney is usually, but not always, nominated by the Administrative Law Section of the ABA. The agency official is generally a Chief ALJ but sometimes a board member, commissioner, or general counsel . . . ." *Id.*

[126] *See LaMacchia Committee Report supra* note 110, at 12.

> Even administrative law judges who had benefitted from selective certification were opposed to its continued use. "Although approximately 82% of the ALJs in the agencies using selective certification attained their positions through its use, a substantial majority of those same judges oppose it. Many of these ALJs, although acknowledging the need for expertise in their cases, are of the opinion that a competent generalist in the law can acquire the necessary expertise within a reasonable period on the job.

Id.

investigatory personal interview; the "rule of three" be expanded by legislation; agencies be required to periodically report on their administrative law judge employment needs and practices; special standards be established for employing retired judges;[127] and, the Civil Service Commission institute more vigorous recruitment efforts.[128] In place of the LaMacchia Committee's recommendations, the Advisory Committee on Administrative Law Judges recommended that the judges be removed from the coverage of the Veterans Preference Act, selective certification be abandoned,[129] and changes be made respecting the professional experience which the Civil Service Commission deemed necessary to qualify an applicant.[130]

On the overall conditions of employment of administrative law judges, the LaMacchia Committee found discrepancies in the conditions under which judges from the various agencies worked.[131] The Committee also found problems with the existence of two prevailing pay grades applicable to administrative law judges.[132] The problem caused by the Civil Service Commission assigning judges to different pay grades led the LaMacchia Committee to recommend that ALJs be placed in a separate pay schedule.[133]

2. The Merits of a Unified Corps and the Feasibility of Voluntary Agency-Conducted Exchange Programs

Two special subcommittees were assigned to study the ability of administrative law judges to preside over cases for more than one agency without compromising their expertise. Both subcommittees dismissed the compromise of expertise as a problem, and suggested that the establishment of a unified corps had greater merit and was more feasible than a voluntary agency loan program. The Committee wholeheartedly endorsed the corps concept.[134]

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[127] The Committee pointed out the inherent conflict between the APA requirements for insulation of judges from direct agency control of their conditions of employment with the requirement of 5 U.S.C. § 3323(b) (1982), which causes a rehired annuitant to serve "at the will of the appointing authority." It suggested authorizing legislation subjecting a re-employed annuitant ALJ instead to standards established and administered by the Civil Service Commission. This advice was not followed and in 1978, the FTC continued to employ the presiding judge in *In re Kellogg Co.*, 99 F.T.C. 8 (1982), after his retirement, under a special contract "at the will of the appointing authority." *Kellogg*, 99 F.T.C. at 23. The long overdue legislation was finally enacted as the result of efforts by a Committee of Senior Administrative Law Judges, headed by Judge Samuel M. Singer. (Pub. L. 98-224, § 2, 98 Stat. 47, § 2, Mar. 2, 1984). *See also* Proposed OPM Rules for Re-employment of Retired ALJs; 49 Fed. Reg. 43691 (Oct. 31, 1984).

[128] *See* Committee Report *supra* note 110, at 62-63.

[129] *See supra* note 122.

[130] Specifically, the Committee recommended that the Civil Service Commission accept the following occupations as providing qualifying experience: adjudicator, arbitrator, mediator, teacher or professor, hearing officer in informal or conference proceedings, and legal consultant. Its recommendation as to the Commission requirement that an applicant demonstrate two years of recent qualifying experience was that it be considered sufficient if acquired during the preceding ten years rather than the preceding seven years.

[131] *See* Committee Report *supra* note 110, at 16-17.

[132] *Id.* at 30.

[133] *Id.* at 63. At the American Bar Association's annual meeting on August 13, 1974, its Judicial Administration Division adopted a resolution recommending that: "Congress and the Civil Service Commission should establish a new and separate salary schedule for application to administrative law judges appropriate to the scope and type of work they perform. The schedule might be denominated 'Federal Administrative Law Judges Schedule,' with no conventional grade — classification differentiations, and with a salary range not to exceed the level established for executive salaries level IV." *Id.*

As envisioned by the Committee, the corps would preserve expertise and meet stated agency objections by being organized into specialized divisions.[135] The Committee's recommendation for a corps was overwhelmingly supported by administrative law judges. The Committee's collected statistics showed that sixty-nine percent of the administrative law judges who completed the written questionnaire favored a self-administered corps; fifteen percent preferred a corps administered by the Civil Service Commission; and only eight and one half percent were opposed to its creation.[136]

3. Agency Review Boards

The agency practice of assigning the review of administrative law judge decisions to intermediate boards, which sometimes include non-attorneys as members, particularly disturbed the Committee. It found that review boards, in conducting de novo reviews, substantially prolong the resolution of cases without materially altering the substance of the ALJ's decision.[137] The Committee recommended that rules should be adopted making administrative law judge decisions final, subject only to discretionary review by the agency.[138]

4. Performance Evaluations

A most provocative finding, which has raised more questions than it addressed, was by the Subcommittee on ALJ Productivity — "The Subcommittee on ALJ Productivity was unwilling to accept the view, consensus or otherwise, that production and elapsed time are totally immeasurable and impossible of comparison on the basis of any objective standard . . . ."[139] The Subcommittee supported this position by reference to the Fifth Circuit's control system "which has resulted in such increased production as to have the circuit rank second nationwide in terms of productivity per judge."[140] The Subcommittee concluded that "[t]wo standards of performance are possible of application to ALJ productivity. One is system imposed; the other peer imposed. The latter was favored as generating less antagonism and more cooperation than a standard imposed by management."[141]

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[134] *Id.* at 66-67.

[135] *Id.* "[T]he independent corps would still utilize ALJs having expertise in broad areas, such as transportation, ratemaking, licensing, labor and consumer problems." *Id.*

[136] *Id.* at 45, 63. The Committee stated that: "CALJ's and ALJ's favor the independent corps and believe it to be organizationally and operationally feasible and with sufficient promise of improved utilization to warrant further action." *Id.*

[137] *Id.* at 31-32 (findings 13 through 17). The Committee wrote:

> These bodies usually undertake to conduct *de novo* review of the facts which were developed at hearing, before the ALJ and formed the basis for his initial decision. The Committee has had reported to it cases where the Review Board has materially increased the time of completion of cases (up to two years) without significantly changing the substance of the ALJ's initial decision.

Id.

[138] *Id.*

> The Committee finds that ALJ performance would be improved if Congress would authorize and the agencies would adopt rules making the decision of the administrative law judge final subject to discretionary review by the agency.
>
> Agency review of interlocutory rulings by ALJs, which is permitted by some agency practice, can and does cause substantial administrative delay.
>
> Agencies should by rule provide that interlocutory rulings by the ALJ will not be reviewed before it considers its final decision on the merits without a certification by the judge that review is necessary to prevent substantial detriment to the public interest or undue prejudice to any party.

Id.

The Social Security Administration subsequently attempted to have performance standards applied to its administrative law judges, and, as will be later discussed in detail, gross antagonism resulted.[142]

F. *Lapse Into Limbo*

In recent testimony before the Senate Judiciary Committee, Professor Victor G. Rosenblum assessed the strength of the Office of Personnel Management's commitment to the improvement of the administrative law judge program subsequent to the LaMacchia study.[143] Professor Rosenblum testified

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[139] *Id.* at 39.

[140] *Id.*

[141] *Id.*

[142] *See infra* notes 162-202 and accompanying text.

[143] *See* Fuchs, *supra* note 59.

> The period of constructive implementation of the Conference's 1962 recommendation — exemplified by such promising steps as utilization of a comprehensive written examination, involvement of renowned practitioners and members of the academic community in the oral phase of the examination, addition of trial experience as one basis for qualification for appointment, and establishment of the LaMacchia Committee to study multiple dimensions of the status and utilization of administrative law judges — has long since lapsed into limbo. The change in agency title in 1979 from Civil Service Commission to Office of Personnel Management and the division of functions between OPM and the Merit Systems Protection Board wrought no concomitant renewal of reformist energy or zeal. The appointment in 1981 of a distinguished Administrative Law Judge to direct OPM's Office of Administrative Law Judges momentarily heightened optimism that creative leadership and policy guidance might yet spring from the agency; but it was followed by OPM disinterest in, if not hostility to, Judge Morse's plans for extensive research and modest experimentation. The agency's summary revocation of the Director's parking place was just one indicator of its truncated enthusiasm for the Office of Administrative Law Judges' responsibilities, and Director Morse soon thereafter chose to return to active service as an agency ALJ. General Accounting Office studies of management of the administrative law process offer no reason to believe that OPM has made a salient priority the implementation or evaluation of proposals for improving roles, functions and performance of ALJs. On the contrary, GAO has been overtly critical of management of the administrative law process.

Id. at 260-61.

This is a most telling assessment coming as it does from Professor Rosenblum who has observed the operation of the ALJ program from so many vantage points: as Professor of Administrative Law at Northwestern University since 1958; as Chairman of the ABA's Administrative Law Sec-that the suggestions of the Committee have "lapsed into limbo" and that the OPM demonstrated "truncated enthusiasm" for the recently created Office of Administrative Law Judges.[144] Professor Rosenblum cited a GAO study which resulted in the release of two reports.[145]

The reports made it very clear that both the Civil Service Commission and the agencies failed to heed the recommendations of LaMacchia to curtail inordinate review of the judges' decisions.[146] The investigators were troubled by the absence of structured performance evaluations; the failure of the Civil Service Commission to maintain and use information showing administrative law judge productivity to evaluate agency requests for additional judges; and its pro forma approval of agency requests to use selective certification for choosing new judges.[147] In the closing chapter of its first report, the GAO restated its concerns and concluded that the thirty year old criticisms have been largely overlooked.[148]

The initial report was circulated to departments and agencies as well as to Congress. A year later, the GAO issued its second report, summarizing its prior recommendations and evaluating the responses.[149] This report was

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tion; as the current Vice-President of the American Judicature Society; as a former staff counsel with the House of Representative's Committee on Government Operations; as a member of the Civil Service Commission's Committee on Administrative Law Judges; and as a member of and consultant to the Administrative Conference of the United States. *Id.* at 256.

[144] *Id.*

[145] *See Comptroller General's Report to the Congress*, "*Administrative Process: Better Management Is Needed*," FPCD-78-25 (May 15, 1978) (GAO Report 1978); *Comptroller General's Report to the Congress*, "*Management Improvements In The Administrative Law Process: Much Remains to be Done*," FPCD-79-44 (May 23, 1979) (GAO Report 1979). The reports were responsive to a request by Congressman John Moss for a study by the General Accounting Office pursuant to its authority under the Budget and Accounting Act of 1921, 31 U.S.C. §§ 712, 718, 719 (1982) (amending 33 U.S.C. § 53 (1976)) and the Legislature Reorganization Act of 1970, Pub. L. No. 91-510, 84 Stat. 1140 (1970).

[146] *Id.* at *Digest*, ii-iii. The GAO report of May 15, 1978 stated:

> Although the Administrative Procedure Act was enacted to resolve conflicts promptly and fairly, timely decisions are not being made because the process is burdened with extensive reviews and more complex, judicial procedures than necessary.
>
> . . . .
>
> While agencies have the authority to review Administrative Law Judges' decisions, the process is burdened unnecessarily with multiple layers and numerous agency personnel. This increases the time required to reach a final decision by hundreds of days and the cost by millions of dollars.
>
> . . . .
>
> These multilayer review processes also raise doubts that the Act's goals — making Administrative Law Judges an important factor in the decision process and assuring that agency views are not being unduly emphasized or secretly submitted — are being achieved.

Id.

[147] *Id.* at iv. and v.

[148] *Id.* at 44. "These criticisms are not new. For the past 30 years, committees, studies, and advisory groups have said substantially the same things. Yet little has been done by the Congress, employing agencies, or CSC to significantly improve the situation."

[149] *See* GAO Report 1979 *supra* note 145, at 1-3. The Report stated:

sharply critical of the agencies for doing "little to improve the administrative law process."[150]

G. *Recent OPM Initiatives*

Recent OPM initiatives have ignored recommendations to construct a new single pay grade structure for administrative law judges paying salaries sufficiently attractive to highly qualified applicants. By letter of February 9, 1983, OPM advised all chief administrative law judges and agency personnel directors that new classification criteria would be developed for "the hear and decide type work performed by attorney examiners and ALJs" and, pending its completion, all requests to upgrade an administrative law judge position and applications for the highest administrative law judge register, GS-16, would be deferred.[151] On February 24, 1983, OPM further advised chief administrative law judges of its intent to also suspend receipt of applications for the lower GS-15 register to facilitate commitment of OPM resources to the redesign of the Examination Announcement (No. 318) for Administrative Law Judges, its rating schedule and its "personnel qualification inquiry" forms or "vouchers."[152]

OPM completed its revision of its examination standards and procedures and issued a new examination announcement in May 1984.[153] Although a period of open competition was held under the new examination announcement from June through August of 1984, processing of the new applications are not expected to be completed until April, 1985, when existing registers will be cancelled and new registers issued in replacement.[154] In 1984, OPM resumed filling ALJ vacancies at current GS-15 and GS-16 grade levels and upgraded fourteen GS-15 positions at the Department of Labor to GS-16. However,

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> *LITTLE HAS CHANGED*
>
> Twenty-five departments and agencies responded to our recommendations . . . . After reviewing the responses, we have concluded that our recommendations remain valid, are achievable, and are consistent with statutory constraints, although they may apply in differing degrees to individual departments and agencies. However, agencies have done little or nothing to improve management of the administrative law process. While the agencies agreed that alleviating regulatory delays and improving management were worthy objectives, many reported they did not need to make changes because they
>
> —did not review Administrative Law Judge decisions in excess of what was merited,
> —did not have too many review layers, or
> —were already doing enough to meet our report's intent.

Id.

[150] *Id.*

[151] Morse, "*The Administrative Law Judge - A New Direction For The Corps?*," 30 FED. BAR NEWS & JOURNAL 398, 399 (1983).

[152] *Id.* at 400.

[153] *See* Administrative Law Judge Examination Announcement No. 318, May 1984, Office of Personnel Management, Office of Administrative Law Judges (available in the offices of the New England Law Review).

[154] Transcribed remarks at the 21st Annual Seminar of the Federal Administrative Law Judge Conference (Sept. 9-11, 1984) by Craig P. Pettibone, Assistant Director for ALJ Staffing Group, Office of Personnel Management (available in the offices of the New England Law Review).

OPM intiatives to reclassify the positions have not ceased, they were merely "put on hold pending completion of an overall staff review of classification policy."[155]

Particularly disturbing to the judges and the legal community were comments by OPM officials that "egregious grade creep" had affected these salaries. The support for this assertion was a comparison of applicable grades in 1946 and 1983.[156] As Judge Marvin Morse has noted, to make comparisons with pay grades in 1946 ignores the fact that bar membership was not required of candidates until 1964.[157]

The Office of Personnel Management initiatives to change the pay grades of administrative law judges and others employed by the federal government who perform "hear and decide type work,"[158] were sufficiently upsetting to cause the Federal Administrative Law Judges Conference to seek legislation to remove ALJ salaries from the GS pay grade structure.[159]

The changes OPM initially proposed for Announcement 318, controlling its procedures for verifying qualifications of applicants for administrative law judge positions, also produced immediate protest. Professional associations of administrative law judges[160] were joined by members of the practicing bar in voicing concern that the standards were being weakened rather than strengthened.[161] The present head of the OPM office concerned with administrative law judges has been responsive to each criticism and has substantially revised the new standards.[162] Among the changes originally proposed was replacement

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[155] *Id.* at 6.

[156] *See supra* note 151. The new classification criteria promised by OPM were for "the hear and decide type work performed by attorney-examiners and ALJ's."

[157] *Id.* at 401 n.3.

[158] *Id.* at 400. "OPM is uncertain, however, as to the composition of the 'hear and decide' component." The following table, reporting results of our own inquiry, identifies the full-time 'Attorney-Examiners' (many, but not all, of whom serve with the title 'Administrative Judge').

Boards of Contract Appeals

[Agriculture; Armed Services; Corps of Engineers; GSA; HUD; Interior; NASA; Postal Service; Transportation and Veterans Administration]	78
Board of Veterans Appeals	40
Interior [various tribunals]	26
Immigration Board	51
Merit Systems Protection Board	119
Small Business Administration	6
Social Security Administration, Appeals Council	15
Trademark Trial and Appeals Board	7

[159] *See* H.R. 4090, 98 Cong., 1st Sess., 129 CONG. REC. H8075-76 (daily ed. Oct. 5, 1983). This legislation was introduced on October 5, 1983, by Representatives Oakar (D. Ohio) and Long (D. Md).

[160] *See supra* note 67.

[161] The Administrative Law Section of the ABA, for example, gave this matter special consideration at meetings of its Council and several of its members met on various occasions with OPM officials.

[162] Mr. Craig P. Pettibone presently heads this office as the "Assistant Director for Administrative Law Judges Staffing Group." His immediate predecessor, Judge Marvin H. Morse, served as "Director of the Office of Administrative Law Judges." This title change tends to verify

of the OPM-conducted voucher system with personal reference inquiries made directly by the agency employer. This proposal raised fears that agencies would be given additional opportunity to choose favorites. However, OPM is continuing its practice of conducting all personal inquiries to applicants' professional references. This, and the OPM's willingness to accept other recommendations by the bar and administrative law judges, has tended to defuse much of the initial opposition.[163] OPM's susceptibility to politically voiced concerns, however, continues to be a real threat to judicial independence.

H. The Merit Systems Protection Board

The concerns generated by OPM initiatives in 1983, pale in comparison to those generated this past year by the Merit Systems Protection Board (MSPB) in its exercise of jurisdiction over personnel complaints lodged against federal administrative law judges. On February 6, 1984, MSPB handed down rulings in proceedings brought by the Social Security Administration (SSA) against four of its judges.[164] Several of the rulings sent out mixed and troubling signals having ramifications for every federal administrative law judge — not just those employed by SSA.

The Board chose the *Goodman*[165] case to enunciate its most controversial pronouncement. The Board recognized, for the first time, the right of an agency to seek the removal of an administrative law judge on the basis of inadequate performance of judicial duties.[166] Although the Board ultimately dismissed the proceeding against Judge Goodman on the ground that "misconduct was neither alleged nor proven,"[167] the dismissal must be considered a

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Professor Rosenblum's assessment that OPM is showing diminished interest in the importance of the office. Additionally, there are two supervisory levels layered between Mr. Pettibone and OPM's Director, whereas only one separated Judge Morse from the Director and Judge Morse's predecessor reported directly to the Director of OPM.

Mr. Pettibone and Judge Morse, who are specifically mentioned in this article, have each shown dedication and diligence in seeking improvements beneficial to the administrative judiciary and to the administrative process. Their personal dedication, however, has been asserted within the confines of OPM which has proven itself to be an inappropriate steward for the sensitive duties entrusted it by the APA.

[163] On February 10, 1984, at its Midyear meeting, the Executive Committee of the National Conference of Administrative Law Judges, ABA's Judicial Administration Division, approved a letter to Craig Pettibone expressing concurrence with many of these revised changes (unpublished) (available in the offices of the New England Law Review).

[164] *See* SSA v. Goodman, HQ 75218210015; SSA v. Brennan, HQ 7521820010; SSA v. Manion, HQ 75218210008; and SSA v. Davis, HQ 75218210026. Inasmuch as the cases were not joined and one of them, *Davis*, concerned misconduct charges which is a recognized ground for an administrative law judge's removal having no bearings on the novel issues involved in the others, MSPB's simultaneous issuance of decisions in all four cases is inexplicable. However, the misconduct charged in *Davis*, lewd and lascivious conduct, because of its sensational nature, denigrates all members of the class (unpublished cases, available in the offices of the New England Law Review).

[165] *Goodman, supra* note 164.

[166] *See Goodman supra* note 164, at 16. The SSA sought Judge Goodman's removal because he issued a lower number of decisions per month than the statistical national average for all administrative law judges in its employ.

[167] *Id.*

pyrrhic victory for administrative law judges who had filed amicus briefs on Judge Goodman's behalf.[168]

The initial question raised by *Goodman* is how a complaint, alleging inadequate, comparatively low performance, can be recognized by MSPB since the preparation of the comparative statistics necessarily required SSA to violate an express OPM regulation banning it from rating the performance of an administrative law judge.[169] The MSPB decision did not address this question.[170]

Goodman did expressly reject the applicability of "the efficiency of the service" standard[171] used to measure traditional adverse personnel actions,[172] but it left unanswered whether the rejection was due to concern for the decisional independence of administrative law judges. In distinguishing the APA's "good cause" standard[173] from "efficiency of the service," the Board simply stated the two standards "are different".[174] It reserved "for later cases, the questions of whether good cause is a stricter standard and whether good cause could ever be based upon facts which would not have satisfied the efficiency of the service standard."[175]

The only case respecting administrative law judges decided by the Supreme Court after the *Ramspeck* decision,[176] was *Butz v. Economou.*[177] *Butz* did not bring the removal for good cause standard before the Court for review. The Court, however, in holding that administrative law judges were entitled to absolute immunity in performing duties "functionally comparable" to trial judges, expressed concern for judges' insulation from "pressures by the parties or other officials within the agency."[178] The Court's earlier holding, in *Ramspeck*, which expanded the grounds upon which an agency may obtain a judge's removal,[179] assumed "that the (Civil Service) Commission will prevent any devious practice by an agency . . . ."[180] The Merit Systems Protection Board, however, completely disregarded the OPM regulation designed to prevent devious agency practices incidental to rating the performance of administrative law judges.[181]

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[168] Amicus briefs were filed by both the Federal Administrative Law Judges Conference and the Association of Administrative Law Judges, Inc.

[169] *See* 5 C.F.R. § 930.211 (1984) (performance rating) which states: "An agency shall not rate the performance of an administrative law judge." This regulation is consistent with the exclusion of administrative law judges from the coverage of chapter 43 of Title 5 which permits agencies to establish, for all other agency employees, performance appraisal systems and authorizes them to take actions for "unacceptable performance" 5 U.S.C. § 4301(2)(d). MSPB interpreted the exclusion from the statute's coverage as merely making unavailable the lower substantial evidence standard of proof provided for chapter 43 actions in 5 U.S.C. § 7701(C)(1)(A). *See Goodman, supra* note 164, at 13-14.

[170] ACUS recently invited views and comments on a recommendation that MSPB should specify by regulation, the factual showing an agency must make in a proceeding to discipline an ALJ for failure to meet a minimum productivity standard (notice published 49 Fed. Reg. 40040-41 (Oct. 12, 1984).

[171] *See Goodman, supra* note 164, at n.8.

[172] 5 U.S.C. § 7521(a) (1982) states:

> An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] *See supra* note 86 and accompanying text.

[177] 438 U.S. 478 (1978).

[178] *Id.* at 513.

It is feared that the MSPB's invitation to agencies to file complaints against its administrative law judges based upon performance, may expose the judges to the very pressures that the Supreme Court concluded in *Butz* had been eliminated by the APA. Further, the decision is not entirely consistent with prior opinions of the Attorney General. In 1951, Attorney General Ford ruled that an agency may not promote hearing examiners, citing the danger of subtle influence on the judges to act according to agency wishes.[182] In 1977, Attorney General Levi ruled that an agency was in violation of the APA's "prescription for independence of adjudicatory action" when it reprimanded an administrative law judge "as a means of affecting, controlling or sanctioning an administrative law judge's decision in a formal APA proceeding."[183] The Attorney General construed the issuance of a decision by an administrative law judge as the exercise of a protected adjudicatory responsibility.[184]

Similar charges of low performance were involved in *Brennan*[185] and the Board used the decision to summarize its holding in *Goodman*.[186] The Board dismissed the charges against Brennan for the same reasons given in *Goodman*, but remanded the case for further action because of another specification in the complaint which "might have formed the basis for a separate insubordination charge."[187] Specifically, the complaint charged that Judge Brennan, in his written response to a memorandum from SSA's Chief Administrative Law Judge, "did not explain specifically why he was unable to schedule and hear more cases."[188] MSPB decided that this incomplete response was to be considered on remand to determine whether it constituted a basis for a severable insubordination charge.[189] It held open the insubordination charge for further action on the finding[190] "that the respondent's incomplete response disclosed a disrespectful attitude toward a supervisory official."[191]

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[179] *Ramspeck*, 345 U.S. at 142.

[180] *Id.*

[181] *See supra* note 169.

[182] *See* 41 Op. Att'y Gen. 74, 78 (1951), which states: "[T]he hope of promotion may motivate men as strongly as the fear of loss of their jobs. If salaries and promotions are subject to agency control, there is always danger that a subtle influence will be exerted upon the examiners to decide in accordance with agency wishes." *Id.*

[183] *See* 43 Op. Att'y Gen. 9, 6 (1977).

[184] *Id.* at 7.

> The action to be taken was not ministerial; nor do the facts as presented involve any formal judicial injunction against issuance. Judgment, then, had to be exercised — and a sort of judgment which, in the context, was essentially judicial, and was to be made by the administrative law judge according to his own understanding and conscience. In my view, therefore, an agency reprimand with respect to that decision was improper.

Id. (footnote omitted).

[185] *See* SSA v. Brennan, HQ7521820010 (Feb. 6, 1984).

[186] *Id.* at 2. "In Social Security Administration v. Goodman . . . decided this date, the Board thoroughly analyzed the legal arguments against an agency's initiation of such actions and concluded that performance-based actions are not precluded as a matter of law." *Id.*

[187] *Id.* at 4.

[188] *Id.*

The Board's reluctance to summarily reject the removal of a judge because he showed a disrespectful attitude toward a superior is a dreadful signal that the Board is considering future expansive interpretation of the good cause standard. Such an expansion could encompass the complete panoply of charges that may be lodged against federal employees under the traditional "efficiency of the service" standard.

In *Manion*,[192] the Board again acknowledged that the two standards are distinct,[193] but did nothing that would indicate the good cause standard was recognized as more protective in its thirty day suspension of Judge Manion for insubordination. A footnote in *Goodman* reinforced a directory signal sent to agencies in *Manion* that may be a new template for building a personnel action against an administrative law judge.[194]

Prior to these decisions, successful personnel actions against administrative law judges involved egregious misconduct,[195] incapacity,[196] or repeated refusals of work assignments.[197] SSA's motives in actively seeking to expand the parameters of past agency personnel actions to remove low producers, prompts inquiry.

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[189] *Id.*

[190] Before the Board considers a personnel proceeding against an administrative law judge, it is first heard by one of the two GS-16 administrative law judges in its own employ who will issue a recommended decision (finding) which is reviewed by the Board on the basis of exceptions filed by the parties. In *Brennan*, this review led the Board to remand the proceeding to its ALJ for further action consistent with its decision. *See Brennan supra* note 185.

[191] *Id.* at 4. On remand to the ALJ employed by MSPB, Judge Brennan's removal was recommended for his insubordination, consisting of a rude and curt reply to his supervisory ALJ. Recently, ACUS has questioned the desirability of ALJ disciplinary proceedings being decided by a single administrative law judge who is an employee of MSPB. ACUS queried whether such proceedings would be better conducted by a panel of three ALJs, two of whom are not permanent employees of MSPB. *See* 49 Fed. Reg. 40040-41 (Oct. 1984).

[192] SSA v. Manion, HQ75218210008 (Feb. 6, 1984).

[193] *Id.* at 8. The Board stated that it had "not imputed (the efficiency of the service standard) into the good cause standard." *Id.*

[194] *See Goodman, supra* note 164, at 16 n.10. "As we hold today in *Social Security Administration v. Manion*, . . . instructions which do not improperly interfere with the performance of an ALJ's judicial functions can be issued by the employing agency." *Id.*

[195] *See, e.g.*, McEachern v. Macy, 341 F.2d 895 (4th Cir. 1965) (financial irresponsibility); *In re* Spielman, 1 MSPB 50 (1979) (falsification of qualifications on application for ALJ position); *In re* Glover, 2 MSPB 71 (1980) (*aff'd* Glover v. Prokop, civil action No. 80-0731-1 (D.D.C. 1981)); Hassan v. Hampton 34 Ad. L. Rep. 2d 819 (D.D.C. 1973) (acceptance of gift from litigant); Chocallo v. Prokop, civil action No. 80-1053 (D.D.C. 1980) (*aff'd mem.*, 673 F.2d 551 (D.C. Cir. 1982) (*cert. denied* 103 S. Ct. 138 (1982)) (intemperate behavior during hearing and partiality). *See also* GSA Department of Health and Human Services v. Glover, HQ 75218210025, civil action No. 82-1148 (4th Cir. 1982) (intemperate and disruptive behavior in dealing with coworkers) (available in the offices of the New England Law Review).

[196] *See, e.g.*, Benton v. United States, 488 F.2d 1017 (Ct. Cl. 1973) (physical incapacitation); *In re* King, 3 MSPB 29 (1980) (mental disability).

[197] *See e.g.* SSA v. Arterberry, MSPB Docket No. HQ 75218210009, *aff'd.*, Arterberry v. Dept. of Health & Human Services, No. 83-1202, (Fed. Cir. Jan. 6, 1984).

The amicus brief filed by the Federal Administrative Law Judges Conference in the *Goodman* case was disparaging and blunt. It charged that the SSA sought the dismissal of randomly selected low-producers to intimidate all of the ALJs in its employ.[198]

In another report highly critical of SSA, the Senate Committee on Governmental Management, Subcommittee on Oversight of Government Affairs, concluded that SSA was using minimum production quotas and productivity goals to pressure administrative law judges to deny a higher number of disability claims.[199] The Merit Systems Protection Board, conversely, concluded that SSA was merely being responsive to court orders requiring expeditious hearings.[200] The Board made no mention of other court actions criticizing poor quality decisions by administrative law judges.[201]

The Merit Systems Protection Board decided that performance-based actions were not barred by a proviso in a prior settlement agreement entered in *Bono v. SSA*[202] that: "OHA will not issue directives or memoranda setting any specific number of dispositions by ALJs as quotas or goals."[203] MSPB entertained these actions through a literal reading of the settlement agreement, holding that the agreement "did not specifically address the agency's authority to institute removal actions."[204]

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[198] Brief for the Federal Administrative Law Judges Conference, SSA v. Goodman, HQ 75218210015 (Feb. 6, 1984).

> It also is plain that SSA is bent on removal of respondent not only as an ALJ, but from government service (*see* Complainant's Exceptions p.4, para. 6). There can be only one reason for this draconian posture: SSA deems the firing of a certain number of 'low producer' ALJs to be necessary, for the same reason French generals would order a few soldiers shot by firing squad after a retreat — 'pour encourager les autres.'

Id.

[199] *See The Role of the Administrative Law Judge in the Title II Social Security Disability Insurance Program*, a report prepared by the Subcommittee on Oversight of Government Management, Senate Committee on Governmental Affairs, 98th Cong., 1st Sess., S. Prt. 98-111 (1983). Based on the hearing the Subcommittee conducted on this issue on June 8, 1983, its Chairman, Senator William S. Cohen and Ranking Minority Member, Senator Carl Levin, reported: "The principal finding of the Subcommittee is that the SSA is pressuring its ALJs to reduce the rate at which they allow disabled persons to participate in or continue to participate in the Social Security disability program." *Id.* at 36. (The SSA has been successful in its efforts as evidenced by recent statistics showing a dramatic decline in the administrative law judge allowance rate in the past year and a half from 67.2 percent in mid-1982, to 51.9 percent in June 1983). The Subcommittee also finds that the SSA is imposing this pressure through several means including the inequitable and unjustified targeting of only allowance decisions and high allowance judges for review pursuant to an amendment sponsored by Senator Henry Bellmon and passed in 1980 (Bellmon Review), and the use of minimum production quotas and productivity goals. *Id.* at 36.

[200] *See Goodman, supra* note 164 at 2 (citing Caswell v. Califano, 583 F.2d 9 (1st Cir. 1978); Day v. Schweiker, 685 F.2d 19 (2d Cir. 1982); Sharpe v. Harris, 621 F.2d 530 (2d Cir. 1980); Cockrum v. Califano, 475 F. Supp. 1222 (D.D.C. 1979); Blankenship v. Secretary of HEW, 587 F.2d 329 (6th Cir. 1978); and White v. Matthews, 559 F.2d 852 (2d Cir. 1977)).

[201] *See, e.g.*, Heckler v. Campbell, 103 S.Ct. 1952, 1959-62 (1983) (Marshall, J., dissenting).

[202] Civil Action No. 77-0819-CV-W-4 (W.D. Mo.) (1977). Several administrative law judges filed this action to challenge SSA establishment of workload goals. The SSA quotas and performance-related personnel complaints gave rise to other lawsuits by SSA judges and The Association of Administrative Law Judges, Inc. *See e.g.*, Association of Administrative Law Judges, Inc. v. Heckler, No. 83-0124 (D.D.C. 1984) (dismissed on Sept. 10, 1984 on basis of assurances by SSA that they were no longer "targeting" ALJs for "behavior modification") *Id.* at 26-27; Nash v. Califano, 613 F.2d 10 (2d Cir. 1980).

In summary, MSPB has shown a willingness to accept an ever-expanding list of charges against administrative law judges under the "good cause" standard. It seems less willing, however, to look behind the charges to determine whether the underlying motivation may be an attempt to interfere in the judge's decisional integrity. Its dismissal of charges have been grounded on the insufficiency of evidence rather than any sense of outrage at the agency's interference with the adjudicative function. Under these circumstances, the APA's compromise permitting administrative law judges to be agency employees on the assumption that their decisional independence shall be safeguarded by the Civil Service Commission (now OPM and MSPB) is losing credibility. The ALJs' pivotal role as impartial decision-makers insulated from agency pressures is thereby jeopardized. The trust that courts have increasingly placed in the reliability of agency adjudications is likewise undermined.

V. Changes in the Role of Administrative Law Judges

A. *An Overview*

Statistics compiled for the year following the enactment of the APA disclosed that over sixty percent of the administrative law judges employed by the federal government were assigned to hearings conducted for various economic regulatory agencies.[205] By 1982, hearings conducted on behalf of those agencies involved less than seven percent of the federal government's administrative law judges. The growth industry, so to speak, was the Social Security Administration (SSA). In 1947, the SSA employed thirteen administrative law judges. In 1982, eight hundred and twenty judges were employed by the SSA, nearly seventy percent of the total employed by the federal government in that year.[206]

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[203] *Bono, supra* note 202. OHA refers to the Office of Hearings and Appeals to which SSA's administrative law judges are assigned.

[204] *See Goodman, supra* note 164, at 11.

[205] The following table, originally compiled by Jeffrey S. Lubbers, Senior Staff Attorney, Office of the Chairman of the Administrative Conference of the United States, appeared in 65 JUDICATURE 268 (1981). The last column was added in conjunction with my testimony given on June 23, 1983 to the Senate Judiciary Subcommittee on Administrative Practice and Procedure respecting S. 1275. Administrative Law Judge Corps Act: Hearings on S. 1275 Before the Senate Judiciary Subcommittee on Administrative Practice and Procedure, 98th Cong., 1st Sess. 53 (1984).

Another significant change in the functions performed by administrative law judges was brought about by a shift in regulatory emphasis from rulemaking hearings for proscriptive application of *newly formulated* policy to the conduct of enforcement proceedings sanctioning past conduct in violation of *existing* policy. This change in regulatory emphasis is due to recent deregulation initiatives and the need for a more expeditious system to enforce regulations in order to avoid the long delays customarily associated with trials.

Agencies and courts have placed greater reliance on the quality and impartiality of an administrative law judge's decisions. This growing respect has transformed the role of administrative law judges in every federal agency. These changes suggest that the compromise embodied in the APA may need to be re-evaluated to determine its present adequacy to safeguard the fair and effective performance of evolving administrative law judge functions.

B. The Social Security Administration and Administrative Law Judges

As initially perceived, the role of the ALJ hearing cases for the SSA was to be inquisitorial, patterned after European administrative judges.[207] This concept assumed that claimants seeking benefits under the social security laws would typically appear pro se. But, since the dollar value of benefits paid under the social security laws has dramatically increased, an increasing number of claimants are now represented by counsel who are able to charge fees sufficient to induce many practitioners to specialize in this area.[208] In response, the SSA has recently engaged on an experimental basis, its own staff of attorneys to actively resist claims where claimants have retained private counsel.[209]

Changes in the Distribution of
Administrative Law Judges: 1947 to 1982

	June 1947	June 1954	July 1962	Feb. 1974	Jan. 1979	Jan. 1980	June 1981	Oct. 1982
*Economic regulatory agencies	125 (63.8%)	165 (59.4%)	221 (44.7%)	153 (19.3%)	157 (14.7%)	142 (12.4%)	109 (9.7%)	81 (6.8%)
**Labor-related agencies	35 (17.9%)	49 (17.6%)	74 (15.0%)	143 (18.1%)	210 (19.6%)	257 (22.4%)	266 (23.8%)	235 (19.9%)
Social Security Administration	13 (6.6%)	20 (7.2%)	164 (33.2%)	431 (54.4%)	660 (61.7%)	698 (60.9%)	695 (62.1%)	820 (69.3%)
Other agencies	23 (11.7%)	44 (15.8%)	35 (7.1%)	65 (8.2%)	43 (4.0%)	49 (4.3%)	49 (4.4%)	49 (4.1%)
TOTALS	196	278	494	792	1070	1146	1119	1183

* CAB, CFTC, CPSC, EPA, FCC, FDA, FERC, FTC, ICC, ITC, SEC, NRC, and predecessor agencies.

** NLRB, Labor, OSHRC, FMSHRC, FLRA.

[206] *See* Table, *supra* note 205.

[207] *See supra* note 19 and accompanying text.

[208] Such practitioners have formed their own professional association — The National Organization of Social Security Claimants Representatives — with more than 2,000 members.

[209] The SSA began this Adversary Procedure Project in 1982. It has been the subject of a

This response represents a definite preference for the traditional judicial model.

The function of ALJs at SSA is further affected by their place in the hearing process. The hearings they conduct are an exercise of a de novo review function. Under the Social Security Disability Insurance Program,[210] the federal government reviews de novo claims previously denied by state agencies. Such agencies initially examine the claims pursuant to a contractual agreement between the states and the federal government.[211] Under this agreement, the state agency is responsible for obtaining the medical and vocational information necessary to determine a disabled worker's eligibility for SSA benefits.[212] The State Disability Determination Service (DDS) employs examiners who obtain medical records from treating and examining physicians. The DDS may request a claimant to provide additional medical evidence through consultative examination and tests. A disability examiner and a DDS staff physician then determine whether a claimant is sufficiently disabled to be entitled to receive benefits.

The state agency decisions are issued under the direction of the SSA which exercises control over the program through its issued guidelines.[213] A rejected claimant is entitled to file for reconsideration and may submit additional evidence to the DDS.[214] If again rejected, the claimant may then appeal for a de novo hearing by an administrative law judge.[215] Here, the claimant may supplement the record with additional documents and testimony and be represented by counsel.

The SSA employs an appeals council which may review the ALJ's decision sua sponte or at the request of either the state disability office or the claimant.[216] The appeals council may affirm, reverse, or remand an ALJ's de-

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special study by a committee of the ABA's National Conference of Administrative Law Judges, Judicial Administration Division. In an unpublished report dated May 19, 1983, the Committee Chairman, Judge Kerns B. Taylor, advised that the project: (1) has received very favorable reactions; (2) has not increased the length of hearings; (3) has better identified award cases through greater prehearing developments and use of vocational experts; and (4) allowed the administrative law judge to better maintain neutrality and objectivity. At the Conference's mid-year meeting in February 1984, the Committee further reported that the program's success has caused the SSA to indicate future plans to expand the program to 50 of its offices (available in the offices of the New England Law Review).

[210] *See* 42 U.S.C. § 416 (1982); 20 C.F.R. 404 (1984). Workers meeting statutory requirements of years employed, and payroll tax deductions contributed to the social security program, are entitled to monthly disability benefits under Title II of the Social Security Act if unable to work because of severe physical or mental incapacity.

[211] *See* 42 U.S.C. §§ 1381-83 (1982); Title II of the Social Security Act, 42 U.S.C. § 401 (1984); 20 C.F.R. 404 (1984).

[212] *Id.*

[213] *See Report supra* note 199, at 4-9.

[214] *Id.* at 4. The Social Security Act was amended by Pub. L. No. 97-455 on January 12, 1983, to require an opportunity for an evidentiary hearing prior to state reconsideration of disability benefit terminations and for "face-to-face reconsiderations."

[215] *Id.*

[216] Pursuant to 20 C.F.R. § 404.970 (1984):

> (a) The Appeals Council will review a case if
>
> (1) There appears to be an abuse of discretion by the administrative law

cision. The claimant's administrative remedy is not exhausted until entry of the appeals council's decision, and only then may legal redress be sought in the federal courts.[217]

The state disability examination process and the ALJ adjudicative process differ in several important respects. State disability examiners make their determinations solely on the basis of written reports.[218] Administrative law judges, however, hear testimony. State disability examiners are required to implement agency policy as found in internal agency guidelines (Program Operation Manual Systems). These guidelines, designed to amplify and explain social security rulings, may be restrictive.[219] ALJs are not bound by the Program Operation Manual Systems; they apply the law as defined by federal courts, statutes, regulations and social security rulings.[220] These differences help to explain a steady increase in the number of claims denied at the state level which have been subsequently allowed by federal administrative law judges.[221]

The tremendous increase in appeals to ALJs is only partially explained by the great likelihood of reversal.[222] The SSA issued narrower guidelines for determining disability, which reduced or terminated the benefits of claimants who were determined to be disabled years ago under less stringent standards. These terminated persons appealed in large numbers to ALJs.

In accordance with government-wide hiring freezes, no new ALJs have been hired by the SSA since 1982, and their number decreased from 771 in 1983 to 758 in 1984.[223] In response to this situation, the SSA increased case production goals for ALJs from 279 decisions in 1975 to 539 in 1983.[224]

> judge;
>
> (2) There is an error of law;
>
> (3) The action, findings, or conclusions of the administrative law judge are not supported by substantial evidence; or
>
> (4) There is a broad policy or procedural issue that may affect the general public interest.
>
> (b) If new and material evidence is submitted with the request for review, the Appeals Council shall evaluate the entire record. It will then review the case if it finds that the administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence currently on record.

Id.

217. *See Report supra* note 199, at 5.

218. *See supra* note 214. These reports are subject to a new "face-to-face reconsideration" requirement.

219. *See Report supra* note 199, at 22.

220. *Id.* at 7. As noted in the *Report*, however, SSA imposes a policy of "non acquiescence" upon its administrative law judges, directing them to disregard court decisions with which it disagrees.

221. Between 1972 and 1982, the reversal rate on review by ALJs increased from approximately 40% to 67.2% — a 75% increase. *Id.* at 8, n.44.

222. *See supra* note 221.

223. *Id. See also supra* note 1.

224. *Id.*

> To keep from being swamped by the caseload, SSA's Office of Hearings and Appeals has steadily raised case production goals for ALJs from 279 decisions in 1975 to 405 in 1981 to 539 in 1983. An average of 45 dispositions per month is now the goal — up from 16 in 1975.

Upon reviewing these practices, the Senate Subcommittee on Government Oversight reported that despite the SSA's accelerated case production schedule, the ALJs were still unable to keep up with the increased caseload.[225] According to the Subcommittee, "[t]he demands by SSA for increased productivity can sacrifice the quality of the ALJ's decision and therefore limit the right of the beneficiary to a fair and full hearing."[226] The subcommittee concluded that since many of the claimants are not represented by counsel, the judge must take the time to make certain that all relevant evidence has been obtained and reviewed before a decision is rendered.[227]

On April 13, 1984, the Department of Health and Human Services (HHS) announced an eighteen month moratorium on benefit terminations to ease its overloaded review dockets. The performance quotas and goals imposed on HHS's administrative law judges, however, have shaken confidence in the APA's system which allows administrative law judges to be directly employed by an agency.

C. Civil Penalties and Other Administrative Sanctions

In 1965, Professor Jaffe wrote that the administrative authority to assess civil penalties was "rarely conferred" and it was "a close question whether there [was] sufficient advantage in conferring the power."[228]

However, merely six years later, the Administrative Conference of the United States (ACUS) reported "an important and salutary trend" — seven executive departments and thirteen independent agencies had collected well in

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Id.

[225] *See Report supra* note 199. The Subcommittee stated that: "although the ALJs have almost tripled their output from 14 case dispositions per month in 1974, to 40 case dispositions per month by March of 1983, ALJs have been unable to keep abreast of the ever-increasing caseload, and the SSA remains dissatisfied with their efforts." *Id.* at 17.

[226] *Id.*

[227] *Id.* The subcommittee noted that the Supreme Court has stated that "[t]here is a 'basic' obligation on the ALJ in these nonadversarial proceedings to develop a full and fair record, which obligation rises to a 'special' duty . . . to scrupulously and conscientiously explore all relevant facts where an unrepresented claimant has not waived counsel." *Id.* (quoting Heckler v. Campbell, 103 S. Ct. 1952 (1983) (citation omitted)). The Subcommittee concluded that:

> [t]he ALJ must be afforded enough time to research and investigate a case and must be given enough time to develop and examine all of the evidence that is available. However, as ALJs are pressured to increase their productivity, they are forced to devote less and less time to each case and less and less time to the development of pertinent evidence. . . . As ALJs are forced to process more and more claims, faster and faster, it is inevitable that the claimant's right to a full and fair hearing is being jeopardized. According to most ALJs, because of the pressure being placed upon them by the SSA, the rights of the disability claimants have already been compromised, and the quality of their decisions reduced.

Report, supra note 199, at 17.

On September 30, 1983, Senator David Pryor introduced Senate Bill 1911 to establish an independent review commission for social security cases which would become the judges' employer. This bill has been referred to the Senate Judiciary Committee, Subcommittee on Administrative Practice and Procedure. A companion bill, H.R. 3541, was introduced and is pending in the House.

[228] L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTIONS 114 (1965).

excess of ten million dollars in penalties in over 15,000 cases during the 1971 fiscal year.[229] ACUS argued the merits of the administrative civil penalty system stating that "[t]he already critical overburdening of the courts argues against flooding them with controversies of this type, which generally have small precedential significance."[230] ACUS went on to suggest that federal agencies "should evaluate the benefits which may be derived from the use (or increased use) of civil money penalties as a sanction."[231] This 1972 ACUS recommendation encouraged agencies to impose civil monetary penalties through APA adjudications on the record, reviewable by United States Courts of Appeals under the APA's "substantial evidence rule."[232] Thus, these adjudications are not subject to de novo reviews by United States District Courts.[233] In 1976, the Supreme Court held such enforcement procedures to be constitutional in *Atlas Roofing Co. v. Occupational Safety Commission*.[234] By 1979, ACUS was able to report that "[t]he civil money penalty has become one of the most widely used techniques in the enforcement programs of federal administrative agencies."[235]

To the growing list of accusatory proceedings conducted by ALJs, those which enforce statutes by the imposition of sanctions having even harsher consequences than civil penalties must be added: revocation or suspension of a license to engage in a business or profession subject to federal control; withdrawal of inspection services required to sell various products (such as meat) interstate; and the entry of findings which preclude future industry employment.

In 1979, Professor Colin S. Diver of Boston University School of Law issued his final report on agency use of civil money penalties based on a study he conducted on behalf of ACUS.[236] Professor Diver reported that by 1979, there were 348 statutory civil penalties of which 141 were directly assessed by federal departments and agencies.[237] This study led him to conclude that the administrative civil money penalty had come of age as an enforcement device.[238] Research leads me to agree with Professor Diver.[239] As of March

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[229] *See* 1 C.F.R. § 305.72-6 (1984).

[230] *Id.*

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] 430 U.S. 442 (1976).

[235] 1 C.F.R. § 305.79-3 (1984). ACUS also stated that "[s]ince adoption of that Recommendation in 1972, the use of civil money penalties in general and of administratively imposed civil penalties in particular has increased significantly, and the constitutionality and desirability of administratively imposed penalties has been widely recognized." *Id.*

[236] *See The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES — RECOMMENDATION AND REPORTS (1979) (final report). The report was prepared for consideration by the Committee on Informal Action of the Administrative Conference of the United States and represented only the views of the author, and not necessarily those of the Conference, the Committee, or the Office of the Chairman.

[237] *Id.*

[238] *Id.* Professor Diver also concluded that:

> Although Congress has authorized civil fines for federal regulatory offenses for well over a century, until quite recently it restricted their use to a handful of federal

1984, thirty federal departments and agencies were authorized by statute to impose civil money penalties.[240] Pursuant to the APA, most agencies are required to afford the accused a hearing conducted by an ALJ.[241] The pattern[242] for maximum authorized civil penalties is 1,000 dollars per violation under older statutes, 5,000 dollars per violation under more recent statutes, and 10,000 dollars under the most recent statutes.[243] Some recently enacted statutes have stated maximums as high as 100,000 dollars.[244] One statute uses a benefit of noncompliance standard that may far exceed any stated maximum.[245]

The rules of practice applied in these adversarial cases are prepared by the agency, often by its Office of General Counsel which acts as prosecutor. The ALJ's decision in such a proceeding is subject to agency review under the regulations issued by the agency.

Appeals from agency orders assessing civil penalties are often made directly to federal courts of appeals which review on the substantial evidence standard.[246] Some statutes, however, still provide for de novo review by federal district courts.[247]

A question arises as to the extent that the values of fairness and public satisfaction are served when the administrative law judge who hears a sanction case is an employee of the very agency that appears before him as prosecutor. Professor Verkuil has stated that "[w]here sanctions are imposed, few would argue with the proposition that if the values of fairness and satisfaction should

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> programs and their ascertainment and collection to judicial proceedings . . . . [But by 1979] the civil fine has assured a place of paramount importance in the compliance arsenal of most federal agencies. It is today almost inconceivable that Congress would authorize a major administrative regulatory program without empowering the enforcing agency to impose civil monetary penalties as a sanction.

Id.

[239] I received substantial assistance in this research from Michael Hardy, then employed by the U.S. Dept. of Labor as a law clerk, who prepared a "Table of Statutes Authorizing Enforcement Through Administrative Imposition of Civil Penalties" which was entered in support of my testimony before the Senate Judiciary Committee on June 23, 1983. *See Hearings, supra* note 68, at 54-63. In March 1984, Mr. Hardy prepared a revised version of the Table which is the corrected source of all data hereinafter supplied (available in the offices of the New England Law Review).

[240] *Id.*

[241] *Id. See also* 5 U.S.C. § 554 (1982).

[242] This general pattern does not apply to the Coast Guard. The maximum amount of civil penalties under statutes administered by the Coast Guard vary from a low of $50 for violations respecting the manning of vessels, *see* 46 U.S.C. § 101(E) (1982), to $25,000 for water pollution, *see* 33 U.S.C. § 1908(B) (1982), and $100,000 for violations respecting inspection of vessels, *see* U.S.C. § 4311(B) (1982).

[243] *See supra* note 240.

[244] *Id. See, e.g.*, 7 U.S.C. § 9 (1982) (pertaining to regulation of commodities trading by Commodity Futures Trading Commission); 42 U.S.C. §§ 2282, 2167(a) and 5846(b) (1982) (pertaining to regulation of atomic energy uses by Nuclear Regulatory Commission).

[245] *See* 42 U.S.C. § 7420 (1982) (pertaining to "Clean Air" as regulated by Environmental Protection Agency). My understanding of the consequences of this law was materially aided by conversations with Judge J.F. Greene who hears such cases for the EPA.

[246] *See supra* note 239 and accompanying text.

[247] *Id.*

conflict with the value of efficiency, fairness and satisfaction should predominate."[248] The United States Supreme Court has declared that: "[a] fair trial in a fair tribunal is a basic requirement of due process . . . [b]ut to perform its high function in the best way 'justice must satisfy the appearance of justice.' "[249]

D. *Judicial Decisions and Changing Attitudes*

The changes in the role of administrative law judges over the past fifty years are matched by corresponding changes in judicial attitudes towards the validity of their work and the degree of deference given it on review.

The *Morgan* cases,[250] decided between 1936 and 1941, have been cited as illustrative of the gradual acceptance of the administrative process by the Court.[251] These cases dealt with the validity of the Secretary of Agriculture's order which purported to fix the maximum rates chargeable by marketing agencies at the Kansas City Stockyards. The order had been entered after a hearing by a subordinate hearing officer. Ratemaking powers granted to the Secretary under the Packers and Stockyards Act require that a "full hearing" first be held.[252] The Secretary's order was held invalid in *Morgan I*[253] because a "full hearing" was interpreted as requiring one in "the tradition of judicial proceedings."[254] The *Morgan I* Court concluded that "[t]he one who decides must hear."[255] The Secretary's order was again held invalid in *Morgan II* because of ex parte consultations between the Secretary and employees of the department, likened by the Court to "active prosecutors for the Government."[256] In *Morgan III*, the Court overturned an order by the district court which would have released to the market agencies funds paid into court which represented the difference between their scheduled rates and the lower rates prescribed by the Secretary's invalid order. The Supreme Court held this release to be premature, stating that courts and agencies are not "wholly independent and unrelated instrumentalities of justice."[257] The Court stated that any court-ordered distribution of the funds in escrow should await the conclusion of the administrative proceeding and be made "with the full record of the Secretary's proceedings before it, including findings supported by evidence. . . ."[258]

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[248] *See* Verkuil, *supra* note 5, at 295. Professor Verkuil recognizes the special nature of administrative decisions involving the imposition of sanctions:

> In imposing sanctions, agencies are concerned with punishment of past conduct and with curtailment of future activity because of prior conduct. Classic examples are unfair labor practice cases, broker-dealer disciplinary proceedings, and unfair trade practice cases. In these situations, the questions usually involve the facts surrounding an individual's conduct and the application of a standard of conduct previously established to those facts. As a result, the adjudicatory model predominates, much as it does in the civil or criminal process. If an erroneous decision is made, the procedures should ensure that it usually goes against the government, not the individual.

Id. (citations omitted).

[249] *See In re* Murchison, 349 U.S. 133, 136 (1955) (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)). The Court also stated that:

> Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness . . . . This Court has said . . . that 'every procedure which would offer a possible temptation to the average man as judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.' Tumey v. State of Ohio, 273 U.S. 510, 532 (1927) . . . . Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.

Id.

[250] Morgan v. United States, 298 U.S. 468 (1936) (*Morgan I*); Morgan v. United States, 304 U.S. 1 (1938) (*Morgan II*); United States v. Morgan, 307 U.S. 183 (1939) (*Morgan III*); and United States v. Morgan, 313 U.S. 409 (1941) (*Morgan IV*).

[251] *See* Gifford, *The Morgan Cases: A Retrospective View*, 30 AD. L. REV. 237 (1978); Rosenblum, *Changing Judicial Perceptions of Administrative Decision-Making and of The Status of Administrative Law Judges: Interrelations of Case Law With Statutory and Pragmatic Factors in Determining ALJ Roles*, 15 THE JUDGES' JOURNAL, 64 (1976).

[252] *See* 7 U.S.C. §§ 181, 211 (1982).

[253] *See supra* note 33 and accompanying text.

The Court, in the first three *Morgan* cases,[259] equated fair procedure with the judicial model of decisionmaking, leaving agency decisions suspect per se. *Morgan IV*, however, characterized administrative agencies as full participants in the governmental process.[260] The Court, in the last of the *Morgan* cases, found the administrative record before the Secretary sufficient to warrant his findings, and refused to "penetrate the precise course of the Secretary's reasoning."[261] This marked the beginning of the Court's recognition of administrative decisionmaker's expertise, discretion, and integrity.[262]

After the enactment of the APA in 1946, three crucial questions were presented for judicial resolution: (1) When must an agency hearing be conducted by an APA examiner?; (2) What weight and deference should be accorded an APA examiner's findings in the administrative and judicial process?; and (3) To what extent are the due process requirements governing the judicial process applicable to the administrative process?

1. When Must an Agency Hearing be Conducted by an Administrative Law Judge?

Senator McCarron, co-sponsor of the APA, wrote several years after its enactment:

> . . . it came to be widely assumed among agencies that, unless the statute authorizing an administrative function *expressly* required a hearing, the Administrative Procedure Act did not apply. Some went further and assumed that . . . the Act did not apply unless there was express statutory requirement not only of a 'hearing' but

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[254] 298 U.S. at 480.

[255] *Id.* at 481.

[256] 304 U.S. at 25.

[257] 307 U.S. at 191.

[258] *Id.* at 198.

[259] *See supra* note 250.

[260] *See Morgan IV*, 313 U.S. at 409.

[261] *Id.* at 420.

[262] *See* Rosenblum, *supra* note 251, at 66.

of decision 'on the record' as well.[263]

In *Wong Yang Sung v. McGrath*,[264] the Court held that even though the statute governing deportations did not expressly grant a right to adjudication, a hearing by an APA examiner was nonetheless required.[265] The principles enunciated in *Wong Yang Sung* requiring the judiciary to effectuate the remedial purposes of the APA respecting the need for an independent, neutral, and impartial hearing officer, have become a cornerstone of administrative law.[266] When, for example, a lower court construed *Wong Yang Sung* to hold that a hearing by the ICC under the Motor Carrier's Act was fair, though not held before an APA examiner because the statute did not specifically require a hearing, the Supreme Court reversed with no explanation other than a citation to *Wong Yang Sung*.[267]

The federal government, however, does employ persons other than ALJs to conduct its administrative hearings.[268] Some non-ALJs conduct hearings authorized by statutes specifically providing for special classes of hearing officers.[269] Furthermore, some agencies continue to regard the absence of talismanic statutory language directing adjudicative determinations to be made *on the record* as license to delegate the hearing function to employees more directly accountable to agency directives.[270]

In 1976, Congress removed Part B Medicare claims from SSA's adjudicatory authority, and authorized the Secretary of Health and Human Services "to contract with private insurance carriers to administer on his behalf the payment of qualifying Part B claims."[271] This mandate was in response to SSA's staggering caseload. SSA had disposed of over 125 million claims in 1976, of which ninety million were Part B medicare claims.[272] In *Schweiker v. McClure*,[273] the Supreme Court decided that the delegation of the administrative adjudicatory function to private companies is not violative of procedural due process if the procedure meets the three-prong test of *Mathews v. Eldridge*.[274] The Court held that the record before it did not support the contention that the accuracy of the decisionmaking would suffer because of unqualified hearing officers.[275]

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[263] McCarron, *Three Years of the Federal Administrative Procedure Act — A Study In Legislation*, 38 Geo. L. J. 574, 579 (1950).

[264] 339 U.S. 33 (1950). The Court further stated that "[i]t might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake." 339 U.S. at 50-51.

[265] *Id.* at 50.

[266] *Id.*

[267] *See* Riss & Co. v. United States, 341 U.S. 907 (1951).

[268] *See supra* note 158.

[269] *See, e.g.*, 5 U.S.C. § 556(b) (1982). This statute provides that: "This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute." *Id.* The Contract Disputes Act (41 U.S.C. §§ 601-13 (1982)), provides for agency boards of contracts appeals, and the Nuclear Regulatory Commission is authorized to establish atomic safety and licensing boards, each comprised of three members, one of whom shall be qualified in the conduct of administrative proceedings and two of whom shall have . . . technical or other qualifications . . . ." *See* 42 U.S.C. § 2241(a) (1982).

[270] Ironically, report of the Second Hoover Commission's Task Force on Legal Services and Procedures, *supra* note 102, cited reparation orders by the Secretary of Agriculture in adjudication of contractual disputes pertaining to the sale of agricultural commodities, as illustrative of the kind of case involving a typically judicial function which should be removed from the executive branch. Yet these cases are still heard by staff attorneys. *See* 7 U.S.C. §§ 181-229, 209-10 (1982); 9 C.F.R. § 202.102(h) (1984); and 7 U.S.C. §§ 499a-s (1982). Furthermore, reparation proceedings under the Perishable Agricultural Commodities Act, 7 U.S.C. §§ 499a-s (1982), are heard by attorneys in the Office of the General Counsel, who are empowered to institute disciplinary proceedings against the losing party in which an office colleague acts as trial counsel, prosecuting the case in a subsequent APA hearing before an ALJ.

2. What Weight and Deference Should be Accorded Administrative Law Judge Decisions?

The Supreme Court discussed the weight to be given to the findings and conclusions of administrative law judges in *Universal Camera v. NLRB*[276] and *FCC v. Allentown Broadcasting Corp.*[277]

In *Universal Camera*, the Court held that the substantial evidence test is to be applied by a reviewing court to ensure that the examiner's report is treated as part of the record.[278] The Court noted that the APA did not make obligatory a recommendation by the Attorney General's Committee, that on questions of fact involving an examiner's demeanor findings, " 'the agency should be reluctant to disturb the findings unless error is clearly shown.' "[279] Nevertheless, the Court stated that although the recommendations are not mandatory, "reviewing courts should . . . give to the examiner's report such probative force as it intrinsically commands."[280]

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[271] *See* Schweiker v. McClure, 456 U.S. 188, 190 (1982).

[272] *See* B. SCHWARTZ, ADMINISTRATIVE LAW: A CASEBOOK 19-20 (1977).

[273] 456 U.S. 188 (1982).

[274] 424 U.S. 319, 335 (1976) (quoting Goldberg v. Kelly, 397 U.S. 254, 266-71 (1970)). *See also infra* note 300 for the Court's treatment of the *Goldberg* test.

[275] *See Schweiker*, 456 U.S. at 199. *See also* Schwartz, *Administrative Law Cases During 1982*, 35 AD. L. REV. 147, 155 (1983), where the author warns that:

> The *McClure* decision has broad implications. In a period of increasing reliance upon the private sector, does it presage other delegations of adjudicatory functions to private persons where agencies are unable to perform them effectively? With all their faults government agencies are subject to political and legal controls that are absent in the private sector. For government to renounce its responsibility for improving administrative procedures by turning to private organs is not necessarily an improvement. All the *McClure* opinion says to support the delegation there also could be said to support abolition of the administrative law judge system and a return to non-ALJ or even non-APA hearing officers . . . .

[276] 340 U.S. 474 (1951).

[277] 349 U.S. 358 (1955).

[278] 340 U.S. at 493. The Court stated that "[i]t is therefore difficult to escape the conclusion that the plain language of the statutes directs a reviewing court to determine the substantiality of evidence on the record including the examiner's report." *Id.*

[279] *Id.* at 494 (quoting FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, *reprinted in* S. DOC. NO. 8, 77th Cong., 1st Sess. (1941).

[280] *Id.* at 495. The Court concluded that:

> We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witness and

On remand,[281] Judge Learned Hand regarded the standard as having changed the duties of a reviewing court, stating that "[w]e are not to be reluctant to insist that an examiner's findings on veracity must not be overruled without a very substantial preponderance of the evidence as recorded."[282] Judge Hand's articulation of the standard was, however, rejected by the Supreme Court in *FCC v. Allentown Broadcasting.*[283] The Court in *Allentown* concluded that the standard went too far in that "[i]t seems to adopt for examiners of administrative agencies the 'clearly erroneous' rule of the Fed. Rules of Civ. Proc., 52(a), applicable to courts."[284]

Professor Kenneth Culp Davis states in the 1980 edition of his Administrative Law Treatise:

> All of the present case law is dependent on the Universal Camera and Allentown opinions of the Supreme Court. The final distillation is that the primary fact-finder is the agency, not the ALJ; that the agency retains "the power of ruling on facts . . . in the first instance;" that the agency still has "all the powers which it would have in making the initial decision;" that the ALJ is a subordinate whose findings do not have the weight of the findings of a district judge; . . . .[285]

Application of such a standard by lower courts has produced unpredictable, wide-ranging results.[286]

The Supreme Court's decision in *Butz*[287] has encouraged lower courts to place greater confidence in findings by ALJs which in turn should cause agen-

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> lived with the case has drawn conclusions different from the Board's than when he reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case. To give it this significance does not seem to us more materially difficult than to heed the other factors which in sum determine whether evidence is 'substantial.'

Id. at 496-97.

[281] 190 F.2d 429, 430 (2d Cir. 1951).

[282] *Id.*

[283] 349 U.S. 358 (1955).

[284] *Id.* at 364.

[285] *See* Davis, *supra* note 6, at 330. Professor Davis further summarizes:

> that the relation between the ALJ and agency is not the same as or even closely similar to the relation between agency and reviewing court; and that the ALJ's findings are nevertheless to be taken into account by the reviewing court and given special weight when they depend upon demeanor of witnesses. The court reviews the agency's determination, not that of the ALJ. But in reviewing the agency's determination, the court may take into account the ALJ's determination, giving special weight to the ALJ's report on demeanor of witnesses.

Id.

[286] Typical cases are catalogued by both Davis, *supra* note 6, at 330-35; and by Professor Rosenbloom in *Changing Judicial Perceptions of Administrative Decision-making and the Status of Administrative Law Judges: Interpretations of Case Law with Statutory and Pragmatic Factors in Determining ALJ Roles*, 15 THE JUDGES JOURNAL 64, 68-69 (1976).

[287] 38 U.S. 478 (1978). *See supra* note 3 and accompanying text.

cies to give them greater deference. In *NLRB v. Permanent Label Corp.*,[288] Judge Aldisert's concurring opinion chided his colleagues and the NLRB for showing insufficient trust for administrative law judges.[289]

3. What Administrative Process is Due Process?

In the 1930's, the Court required administrative procedure to conform with traditional judicial models.[290] Justice Frankfurter helped free the administrative process of those constraints in the 1940's. In *FCC v. Pottsville Broadcasting Co.*,[291] Justice Frankfurter contrasted the power conferred upon administrative agencies with the power reposed in courts and declared that "[t]hese differences in origin and function preclude wholesale transportation of the rules of procedure, trial, and review which have evolved from the history and experience of courts."[292]

Thirty-six years later, in *Mathews v. Eldridge*[293] the Supreme Court "reiterate[d] the wise admonishment of Justice Frankfurter,"[294] and further elaborated that "[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances."[295]

The *Eldridge* Court cited its decision in *Morrisey v. Brewer*[296] to justify a "flexible" standard of due process, balancing the governmental and private interests that are affected on the basis of three factors.[297] The balancing factors were:

> (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures used, and, the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.[298]

The Court specifically referred to its earlier ruling in *Goldberg v.*

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[288] 657 F.2d 512 (3d Cir. 1981).

[289] *Id.* at 528. The *Butz* case was specifically cited by Judge Aldisert who concluded that although differences exist between ALJs and Article III judges, the differences may be more "tenuous" than the cases indicate. *Id.*

[290] See *supra* notes 31-34 and accompanying text for a discussion of *St. Joseph Stock Yards* and the initial *Morgan* cases.

[291] 309 U.S. 134 (1940). See also Justice Frankfurter's majority opinion in *Morgan IV*, 313 U.S. 409 (1941), discussed *supra* note 251 and accompanying text.

[292] *Pottsville*, 309 U.S. at 143.

[293] 424 U.S. 319 (1976).

[294] *Id.* at 348.

[295] *Id.* The Court maintained that all that due process requires is that "'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'" *Id.* (quoting Joint Anti-fascist Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring)). The procedure must be tailored to "the capacities and circumstances of those who are to be heard." *Id.* at 349 (quoting Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970)).

[296] 408 U.S. 471, 481 (1972).

[297] *Eldridge*, 424 U.S. at 334-35.

[298] *Id.* at 335.

Kelly,[299] which established a right to an evidentiary hearing prior to termination of welfare benefits, but decided instead that "an evidentiary hearing is not required prior to the termination of disability benefits [by SSA] and that the present administrative procedures fully comport with due process."[300]

Professor Schwartz interprets the results of *Eldridge*[301] and *Arnett v. Kennedy*[302] as signaling the end of the Court's "rather rigid and mechanical interpretation of the due process clause."[303] Professor Verkuil similarly endorses the *Eldridge* approach to due process required in administrative procedure[304] and has concluded that *Eldridge's* "concept of flexible due process"[305] is a "kind of mandate [which] frees agencies to explore a broad range of procedural alternatives. Good faith attempts to design procedures that respect the values of fairness, efficiency and satisfaction should be received favorably by courts."[306]

Professor Verkuil would apply the new mandate to the various functional categories[307] of administrative decisions to determine the essential due process requirements for each category in terms of fairness, efficiency, and satisfaction.[308] Omnibus regulatory reform bills introduced during the Carter Administration were consistent with Professor Verkuil's emphasis upon informal rulemaking as the preferred and efficient model for administrative procedure.[309]

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[299] 397 U.S. 254 (1970).

[300] *Eldridge*, 424 U.S. at 349. The *Eldridge* Court summarized the *Goldberg* hearing requirements and stated that the evidentiary hearing referred to in the *Eldridge* opinion is generally the type required in *Goldberg*.

> *Goldberg* the Court held that the pretermination hearing must include the following elements: (1) 'timely and adequate notice detailing the reasons for a proposed termination'; (2) 'an effective opportunity [for the recipient] to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally'; (3) retained counsel, if desired; (4) an 'impartial' decisionmaker; (5) a decision resting 'solely on the legal rules and evidence adduced at the hearing'; (6) a statement of reasons for the decision and the evidence relied on.

Id. at 325 n.4 (quoting *Goldberg*, 397 U.S. at 266-71).

[301] 424 U.S. 319 (1976).

[302] 416 U.S. 134 (1974).

[303] Schwartz, *Administrative Law: The Third Century*, 29 AD. L. REV. 291, 301 (1977).

[304] *See* Verkuil, *supra* note 5, at 283-84. The author states:

> In reaffirming Justice Frankfurter's analysis, the *Eldridge* Court took two significant steps: it endorsed the separate concept of administrative procedure and it expanded that concept of administrative procedure from regulatory to non-regulatory determinations. This expanded outlook is of great doctrinal significance.

Id.

[305] *Id.* at 287.

[306] *Id.* at 288. Professor Verkuil's prediction is consistent with the Court's decision in Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978), which reversed a lower court for having "unjustifiably intruded into the administrative process" by imposing additional procedures for the conduct of informal rulemaking greater than that required by the APA. *Id.* at 556.

[307] *Id.* at 294. "While other categories could be conceived, six categories would seem to encompass most administrative decision-making. Those categories are:

1. Imposition of sanctions.
2. Ratemaking, licensing, and other regulatory decisions.
3. Environmental and safety decisions.
4. Awards of benefits, loans, grants, and subsidies.
5. Inspections, audits, and approvals.
6. Planning and policymaking."

Id.

VI. ASSESSMENT OF THE PRESENT ALJ SYSTEM AND NEEDED LEGISLATIVE REFORMS

A. *An Overview*

The APA recognized the need for an independent administrative judiciary, but allowed its members to be agency employees insulated from agency and outside pressures only by the civil service system.[310]

Over time, the APA's administrative law judge system has shown itself to have great strength in fostering expert and reliable decision-making in the various specialties of administrative law. Further, employing the civil service system for recruitment and selection of ALJs has, after considerable prodding by ACUS and the bar, produced an exemplary model for judicial appointments on the basis of demonstrated merit.

The agency employee status of ALJs, however, is the major flaw in the APA system. The ability of agencies to influence case assignments under this system[311] would raise grave questions under the constitutions of European nations[312] and should not be lightly dismissed under our own.[313]

The fact that agency employers are often named litigants or interested parties in the proceedings ALJs conduct, prevents full public confidence in the impartiality and the fairness of those proceedings. It further acts as an incentive to private litigants to appeal adverse decisions to the courts. But inasmuch as present court review of agency action is seldom conducted de novo, the right to judicial review does little to restore public satisfaction.

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[308] *Id.* at 310-11.

[309] *See supra* note 58. For example, S. 262, 96th Cong., 1st Sess. tit. II § 201 (1979), states: "(2) the agency decisionmaking process is frequently overly judicialized; (3) in a significant number of cases, the adoption of adjudicative proceedings that more closely resemble legislative hearings would increase the ability of decisionmakers to analyze the policy issues involved; increase the ability of members of the public to contribute to the record of the proceedings; and reduce the length of time required to decide such matters." *Id.*, *reprinted in* 125 CONG. REC. 1,414 (1979).

[310] *See supra* sections III and IV.

[311] *See, e.g.*, PATCO v. FLRA, 685 F.2d 547, 619-20 (D.C. Cir. 1982) (finding that assignment of case had been "suggested" by agency members).

[312] *See* Rotunda, *The Combination of Functions in Administrative Actions: An Examination of European Alternatives*, 40 FORDHAM L. REV. 101, 114-20 (1971-1972). Regulations similar to those involved in *Ramspeck*, *supra* note 80, were held unconstitutional in Italy, and, as Rotunda explains, were violative of the Italian guarantee of the "Natural Judge." *Id.* at 114-17. Simiiarly, Germany assures litigants of their right to a "Lawful Judge." *Id.* at 117. France protects against abuses stemming from administrative adjudications by having an exceptional form of review available in which subjective motivation of the deciding official may be probed. *Id.* at 118-19.

[313] *See, e.g.*, Withrow v. Larkin, 421 U.S. 35, 46-47 (1975). Concededly, a "fair trial in a fair tribunal is a basic requirement of due process." *In re* Murchison, 349 U.S. 133, 136 (1955). This applies to administrative agencies which adjudicate as well as to courts. Gibson v. Berryhill, 411 U.S. 564, 579 (1973). Not only is a biased decisionmaker constitutionally unacceptable, but "our system of law has always endeavored to prevent even the probability of unfairness." *In re* Murchison, 394 U.S. at 136; *cf.* Tumey v. Ohio, 273 U.S. 510, 532 (1927).

Recent MSPB decisions which permit agency employers to initiate personnel actions against ALJs for poor performance of decisional functions or expression of a disrespectful attitude toward an agency superior are most troublesome. The prosecution of complaints seeking to remove or discipline a judge for the performance of judicial duties should never be controlled by a dissatisfied party in a case the judge has heard. This is the reason why ALJs are excluded by statute from agency performance ratings.[314] Yet, the OPM regulation which prohibited performance ratings by an agency employer was unrecognized in the MSPB decisions. Furthermore, MSPB's interpretations of the APA's good cause standard for removal, seem ready to equate the responsiveness ALJs must show agency employers with the loyalty required of typical agency subordinates.

This pattern of interpretation not only diminishes public confidence in the system, but it also jeopardizes the assumption that ALJs have safeguarded independence which is the basis for the deference courts now give the administrative process. Further, it demoralizes ALJs, hampering recruitment and retention of the most talented. Three bills[315] would address these problems by establishing administrative law judges as a unified, independent corps.[316]

B. The Heflin Bill and Similar Bills in the House

The most oft-discussed of the three bills has come to be known as the Heflin bill after its sponsor, Senator Howell Heflin.[317] Each bill, however, would accomplish the same essential goal. Administrative law judges would no longer be appointed and employed by individual agencies whose cases they hear. Such legislation would rectify the critical problems inherent in the present ALJ/agency relationship. It would also end the expensive, balkanized control over the ALJ function now shared by twenty-nine federal departments which makes the administrative process appear hidden and arcane. A valid, independent administrative judiciary should emerge which will be responsive to the actual adjudicative needs and demands of agencies. It will possess the flexibility needed to match a valuable resource to the changeable caseload requirements of individual agencies. It will give Congress direct oversight over agency adjudication, allowing it to better assess needs and costs,[318] and to perceive and enact needed reforms.

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[314] *See* 5 U.S.C. § 4301(2)(D) (1982).

[315] S. 1275, 98th Cong., 1st Sess., *reprinted in* 129 CONG. REC. S 6610-13 (daily ed. May 12, 1983), was introduced by Senator Howell Heflin, and was referred to the Senate Judiciary Committee, Subcommittee on Administrative Practice and Procedure, which held two hearings on the bill, on June 23 and September 20, 1983 and favorably reported the bill somewhat modified to the full Judiciary Committee on June 12, 1984; H.R. 3539, 98th Cong., 1st Sess. (July 12, 1983) was introduced by Representative Richard C. Shelby, and was referred to the House Judiciary Committee, Subcommittee on Administrative Law and Governmental Relations; and, H.R. 5156, 98th Cong., 1st Sess. (Mar. 15, 1984), was introduced by Representative Dan Glickman for himself, and for Representatives Fish, Berman, Boucher, Frank, Hughes, and Moorhead, was referred to the same House Judiciary Subcommittee. No hearings have been held as yet on either bill introduced in the House.

These bills were not passed by the 98th Congress. All three bills were reintroduced and are currently before the 99th Congress. *See* S. 673, 99th Cong., 1st Sess. (Mar. 14, 1985); H.R. 451, 99th Cong., 1st Sess. (Jan. 3, 1985); H.R. 1213, 99th Cong., 1st Sess. (Feb. 21, 1985).

[316] The bills, *supra* note 315, implement provisions suggested to Congress by the several organizations which represent ALJs. *See supra* note 67. The language of the proposed provisions was formulated by a drafting committee on which the author served. The other members were Chief Judge Nahum Litt, Department of Labor; Judge Michel Levant, Federal Energy Regulatory Commission; and Judge Jair Kaplan, retired, formerly, National Labor Relations Board. Judge I. David Benkin, Federal Energy Regulatory Commission, assisted the group through his extensive expertise as a legislative draftsman.

[317] 98th Cong., 1st Sess. (1983), *reprinted in* 129 CONG. REC. S6610-13 (daily ed. May 12, 1983).

Eight states have already taken this basic step.[319] Testimony and statements presented to the Senate Judiciary Subcommittee which considered Senator Heflin's bill showed that the state experiences were favorable and cost effective.[320]

The federal government should realize similar savings through the greater efficiency and flexibility a unified corps would provide. It is a solution which would avoid the controversial issues involved in proposals by others for an Administrative Court.[321] It recognizes and grants a permanent place and function to an administrative judiciary established pursuant to Article I. In doing so, these legislative proposals retain the advantages of the present system and avoid thrusting an overwhelming volume of highly specialized cases upon the existing Article III judiciary. The proposals also obviate the expensive creation of independent review commissions[322] which otherwise detach administrative and adjudicative functions from investigative and prosecutorial activities. The split of policymaking powers that results upon creation of an independent review commission has been a source of confusion to courts on review.[323]

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[318] The cost of the administrative law judge system cannot be assessed merely in terms of the judges' salaries. Office expenses, the cost of secretarial assistance and law clerks must also be added. In the December 1981 Report to the Congress by the Judicial Conference of the United States, the annual recurring cost of maintaining a district court judgeship was shown to be $304,450 compared with $148,900 for a full-time magistrate. Cost figures show the annual cost of each administrative law judge to be about $125,000, regardless of the level at which the judge's personal salary is set. Levant, *A Unified Corps of Administrative Law Judges — The Transition From a Concept to an Eventual Reality*, 6 W. NEW ENG. L. REV. 705, 712 (1984).

[319] Those states are California, Colorado, Florida, Massachusetts, Minnesota, New Jersey, Tennessee, and Washington. *See* Rich and Brucar, *The Central Panel System for Administrative Law Judges: A Survey of Seven States*, (Frederick, MD: University Publications of America, 1983). The State of Washington is the most recent to employ a central panel system. *See* WASH. REV. CODE ANN. § 34.12.010 (Supp. 1984). Additionally, a central panel is incorporated in the Model State Administrative Procedure Act adopted by the National Conference of Commissioners on Uniform State Laws (1981 Revision). Professor L. Harold Levinson of Vanderbilt University, one of the two reporters for the 1981 Revised Model State APA, has elucidated the purposes underlying central panel systems. *See* Levinson, *The Central Panel System: A Framework that Separates ALJs from Administrative Agencies*, 65 JUDICATURE 236 (1981).

[320] *See Administrative Law Judge Corps Act: Hearings Before the Subcommittee on Administrative Practice and on S. 1275 Procedure of the Committee on the Judiciary United States Senate*, 98th Cong., 1st Sess. 8-11, 75-83, 84-90 (1983), *reprinted in* 15 CONG. INDEX (CCH) 5521-21 (1984). Judge Duane R. Harves, Chief Hearing Examiner, Minnesota Office of Administrative Hearing, testified that the cost of hearings to the Minnesota Public Utilities Commission decreased from $311,330 in 1977, the first year Minnesota's centralized system was in operation, to $184,219 for 1982. *Id.* at 87. The Minnesota Department of Commerce for the same period reduced its costs from $120,000 to less than $60,000. *Id.* Total staff of his office was reduced by 40%, the number of hearing examiners by 27%, and the average backlog per examiner fell from 15 cases to 4 cases. *Id.* at 88-89. Judge Howard H. Kestin, Chief Administrative Law Judge, State of New Jersey, reported similar benefits after New Jersey established such a system in 1979. The number of hearing officers decreased from 130 to 45 with productivity increases so that each judge disposed of 226 cases in 1982, compared with 145 cases in 1980. *Id.* at 77. Despite inflation, the average cost of processing administrative cases in New Jersey decreased from $540 in 1980 to $508 in 1982. *Id.*

The corps concept was advanced ten years ago by the LaMacchia Committee.[324] It unquestionably represents the one change that can be made to the present system that will do the most to restore public confidence in the fairness of the administrative process.

The hearings on the Heflin bill have resulted in extensive analysis by proponents and opponents alike.[325] The various details of the bill have provoked so many comments that it is not feasible to address all of them in the present article.[326] However, two principal contributors to this issue of the NEW ENGLAND LAW REVIEW, Professor Harold Levinson and Mr. Robert Joost, have kindly provided copies of their articles and invited comment.[327] Both agree that establishing ALJs as a separate corps is desirable.[328] Nonetheless, Professor Levinson remains concerned that the bill may be incomplete in that it does not presently resolve the knotty jurisdictional questions that will arise out of the new relationship of ALJs to agencies and the courts.[329]

Mr. Joost, on the other hand, would rewrite the Heflin bill to lower the level of legal experience required of candidates for ALJ positions; reduce starting salaries; subject the judges to performance controls; assign them to adjudicative tribunals specially created for each federal agency; and otherwise down-grade the positions.[330] Although the bill undoubtedly may be improved, comparison of its present provisions with those suggested by Mr. Joost indicates that he would divert the thrust of this legislation onto a wrong course. Examination of the goals and provisions of the Heflin bill also reveals that enactment of this legislation should not await resolution of the various jurisdictional questions Professor Levinson has raised.

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[321] 321. *See supra* notes 101-02, 112-13 (proposals by the Second Hoover Commission, the Ash Council, and the Bork Committee). *See also* Marquandt & Wheat, *The Developing Concept of an Administrative Court*, 33 AD. L. REV. 301 (1981) (discussion of various proposals and advancement of their own proposal); De Seife, *Administrative Law Reform: A Focus on the Administrative Law Judge*, 13 VAL. U.L. REV. 229 (1979).

[322] 322. The two in existence are The Occupational Safety and Health Review Commission and The Federal Mine Safety and Health Commission.

[323] 323. *See* Sullivan, *Independent Adjudication and Occupational Safety and Health Policy: A Test for Administrative Court Theory*, 31 AD. L. REV. 177 (1979).

[324] 324. *See supra* notes 116-50 and accompanying text.

[325] 325. *See supra* note 68, *Hearings on the Adminsitrative Law Judge Corps Act: S. 1275.*

[326] 326. *See* Palmer and Bernstein, *Establishing Federal Adminstrative Law Judges as an Independent Corps: The Heflin Bill*, 6 W. NEW ENG. L. REV. 673 (1984) (discussing principal testimony in support of, and opposed to, the Heflin bill); Levant, *A Unified Corps of Administrative Law Judges — The Transition From a Concept to an Eventual Reality*, 6 W. NEW ENG. L. REV. 705 (1984) (discussing principal objectives and expected benefits of bill; responding to criticism of bill).

[327] 327. *See* Levinson, *The Proposed Administrative Law Judge Corps: An Incomplete But Important Reform Effort*, 19 NEW ENG. L. REV. 733 (1984); Joost, *A Corps of Federal Administrative Law Judges: Why? What Kind? Operating How? Under Whose Control?*, 19 NEW ENG. L. REV. 695 (1984).

[328] 328. *Id.*

[329] 329. *See* Levinson *supra* note 327, at 738.

1. The Heflin Bill and Changes Recommended by Professor Levinson and Mr. Joost

a. The Corps Would Consist of ALJs

The bill provides that all ALJs appointed pursuant to the APA[331] are to be transferred to the newly established corps.[332] Professor Levinson and Mr. Joost recommend inclusion of other hearing officers employed by the federal government as part of the new corps. This was considered by proponents of the bill,[333] but discussions with members of boards of contract appeals and non-APA hearing officers employed by federal agencies indicated a sharp division in opinion as to the desirability of the inclusion of the other hearing officers in the corps. However, the structure proposed for the corps is sufficiently flexible so that it could readily be constituted as the single administrative judiciary for the entire federal government.

b. The Corps' Structure

The proposed corps would be headed by a chief ALJ appointed by the President with the advice and consent of the Senate. The Chief ALJ would be chosen from qualified ALJs, recommended by a judicial nomination commission appointed by eminent members of the bench and bar. In keeping with the present major specialties of administrative law, the corps would initially be divided into seven divisions.[334] A division chief judge would administer each division and, together with the chief judge, govern the corps' affairs and operations as a collegial council.[335] The chief judge and the division chiefs would be ALJs for at least five years prior to appointment.

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[330] *See* Joost *supra* note 327, at 701-16.

[331] 5 U.S.C. § 3105 (1982).

[332] S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 562(b)), *reprinted in* 129 CONG. REC. S6610 (daily ed. May 12, 1983).

[333] *See supra* note 317.

[334] *See* S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 564(b)), *reprinted in* 129 CONG. REC. S6611 (daily ed. May 12, 1983). These divisions would be organized in the following manner:

1. *Division of Communications, Public Utility, and Transportation Regulation.* Federal Communications Commission, Federal Energy Regulatory Commission, Interstate Commerce Commission, Civil Aeronautics Board, Federal Maritime Commission, Nuclear Regulatory Commission.
2. *Division of Health, Safety and Environmental Regulation.* Occupational Safety and Health Review Commission, Federal Mine Safety and Health Review Commission, National Transportation Safety Board, Environmental Protection Agency, Department of the Interior, National Oceanic and Atmospheric Administration, Coast Guard.
3. *Division of Labor.* Department of Labor.
4. *Division of Labor Relations.* National Labor Relations Board, Federal Labor Relations Authority.

Both Professor Levinson and Mr. Joost would place all power over the corps' governance in a single head. Professor Levinson has suggested that concentrating power in the chief judge would heighten the political legitimacy of the corps.[336] He would eliminate prior screening by a nomination commission to increase the political responsiveness of the corps' head.[337] The fact that the chief judge will be a Presidential appointee with the consent of the Senate should of itself be sufficient assurance of the corps' legitimacy. Many of my colleagues have expressed concern that the Presidential appointment of the chief judge could become the model for appointment of all ALJs. They fear that the highly acclaimed merit selection system for their appointments might be swept away by politicization. Restricting Presidential appointment to a chief judge who shares power with a collegially constituted council rightly recognizes these important concerns and strikes the proper balance. In the final analysis, the true legitimacy of the corps will be found in its acceptance by the public. The Heflin bill has been carefully drafted to create an institution for housing the administrative judiciary that better protects the public against arbitrary administrative actions, and for that reason should quickly gain full public confidence.

Professor Levinson further questions the bill's requirement that the chief judge and the division chiefs have five years prior experience as ALJs.[338] Mr. Joost, on the other hand, lists six advantages of this requirement:[339]

> 1. It will continue existing insulation of administrative law judges from political factors;
> 2. It may induce lawyers to apply to be administrative law judges and act as an incentive to administrative law judges to work harder to be promoted to these positions;
> 3. It will boost the morale of administrative law judges who will be more apt to support and work for 'one of their own';
> 4. In-house appointment means there will be little loss of time after appointment for learning the duties of the positions and how to perform them;

> 5. *Division of Benefits Programs*. Social Security Administration.
> 6. *Division of Securities, Commodities, and Trade Regulation*. Department of Agriculture, Commodity Futures Trading Commission, Securities and Exchange Commission, Federal Trade Commission, International Trade Commission.
> 7. *Division of General Programs and Grants*. Drug Enforcement Administration, Department of Housing and Urban Development, Food and Drug Administration, Bureau of Alcohol, Tobacco and Firearms, Small Business Administration, U.S. Postal Service, Merit Systems Protection Board.

Id.

[335] *Id.* The bill was proposed to be codified at 5 U.S.C. § 565(a). The bill died with the adjournment of the 98th Congress in October 1984.

[336] *See* Levinson *supra* note 327, at 748-49.

[337] *Id.* at 749-50.

[338] *Id.* at 749.

[339] *See* Joost *supra* note 326, at 705-06.

> 5. The appointees will personally know many members of the corps which will make the appointees more effective;
> 6. Those who are administrative law judges are more apt to know and understand the needs and aspirations of administrative law judges.

Mr. Joost, however, also recommends that all power over the corps be placed in a single person whom he would redesignate as a "Director" to emphasize that the real function of the office is to "manage, administer and direct, not to judge."[340] I strongly disagree with Mr. Joost's concept of the head of the corps' essential nature and function. The Corps does not need a straw boss who will speed up production by directives and show of force or, conversely, by the use of bonus pay as Mr. Joost also recommends.[341] What is needed is a true jurist who has the personal strength to inspire ALJs to fully employ their existing judicial skills and assist in further developing untapped potential. The designation of the corps' head official as "Chief Judge" recognizes this fact and should encourage the appointee to hear cases, and thereby to better keep in touch with the daily problems encountered by judges in the divisions. People who stay in touch this way make better leaders than those who employ carrot-stick management techniques which have no place in a judicial system.

Administrative law judges who express doubts about the advisability of a corps largely do so out of fear of an autocratic chief judge who would have to be endured for a full five-year term. Past experiences have shown that many fine ALJs turn out to be very poor chief judges. Dividing power among the Council helps avoid this consequence, for the necessary protection of the judges and the public. It should help assure that the decision an individual ALJ enters in a particular case is in no sense influenced by the commands of another. It is expected that the Council will engage the services of professional, non-judge, administrators similar to those employed by numerous American courts to carry out various administrative duties. But the ultimate power over professional managers must be vested in the Council of judges.

Mr. Joost also advocates the continued linkage of ALJs to individual agencies by special "adjudication tribunals" which he would create, within the corps' divisions, for every agency now employing ALJs.[342] This proposal would be exorbitantly expensive inasmuch as six agencies employ only one judge; seventeen employ six or less; and only five employ more than a dozen.[343] Mr. Joost would justify the added expense as a way of preserving specialized expertise.[344]

The Heflin bill's creation of specialized divisions adequately safeguards expertise without the need for the continuation of special relationships bonding each judge to a single agency. The laws that apply to the various specialties of administrative law are the same regardless of which agency seeks their application. Each judge is required to be assigned to a division in accordance with his or her particular expertise,[345] and there is no restriction in the Heflin bill to difficult and significant agency cases being assigned to those judges who previously served the agency. Additionally, Congressman Glickman's bill, which was introduced subsequent to the hearings on the Heflin bill, contains provisions specifically designed to assure that specialized expertise will be enhanced and applied to agency cases. It specifically requires that a "case involving a difficult or significant question of law, fact or policy shall be assigned to a judge possessing expertise in the subject matter involved."[346] It further requires the corps "to establish . . . initial and continuing educational programs to assure that each administrative law judge assigned to hear cases of an agency has the necessary training in the specialized field of law of that agency."[347]

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[340] *Id.*
[341] *Id.* at 708.
[342] *Id.* at 702.
[343] OPM data released on November 21, 1983.
[344] *See* Joost, *supra* note 327, at 702.

Furthermore, too much specialization can be self-defeating. As Mr. Justice Rehnquist has pointed out, "[S]omewhere there comes a tipping point . . . at which the number of routine and uninteresting tasks . . . becomes so large a portion of the whole that the number of qualified people willing to take the job diminishes sharply."[348]

c. *Selection and Compensation*

The proposed corps would appoint new ALJs under the present merit selection system administered by OPM-conducted examination and screening of candidates. However, the bill would expand the list of eligibles available for selection from the best three to the best five candidates certified by OPM. This should increase opportunities for women and minority candidates who are less likely to be entitled to veteran's preference.[349] Upon appointment, all judges would be paid uniform salaries.[350]

Mr. Joost would modify the Heflin bill to eliminate OPM's authority over the screening of applicants for ALJ positions. Although OPM's performance in this respect has been less than perfect, improvements are in process. Mr. Pettibone, who presently directs OPM's ALJ selection program, has proven himself responsive to constructive criticism from the public and the bar. Moreover, in its certification of qualified applicants, OPM has shielded the appointment process from politicization.

Mr. Joost would not merely shift the responsibility for screening applicants to the corps, he would lower the qualifying standards and reduce the entrance pay. The best assurance of satisfactory judicial performance is to recruit the most talented members of the bar to the bench. The lowering of qualifying standards and starting salaries defeats this goal. Mr. Joost's proposed changes would not serve to attract the ablest and most experienced trial attorneys to become ALJs.[351] Nor would the Heflin bill be improved by adopting his recommendations for paying judges under a system of multiple grades and employing unqualified applicants as lower grade examiners. It would reinstitute the divisive morale problems that have been the hallmark of multiple pay grades for ALJs. Furthermore, it would limit the flexibility of the corps. The maintenance of various pay grades requires restrictive distinctions to be made when cases are assigned and judges are transferred between divisions, which would defeat the ability of the corps to be responsive to changing agency caseloads. The advantages Mr. Joost would achieve by employment of lower grade adjudicators may be substantially realized by the corps' employment of law clerks and paralegals to perform ancillary functions.

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[345] *See* S. 1275, 98th Cong., 1st Sess. § 2 (1983).

[346] *See* H.R. 5156, 98th Cong., 2d Sess. § 2 (1984).

[347] *Id.*

[348] Rehnquist, *What the Justices are Saying*, 62 A.B.A. J. 1454, 1456 (1976).

[349] *See* S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 567(a)).

[350] *Id.* (proposing codification at 5 U.S.C. § 562(b), 564(a)). Though slightly higher salaries are provided for the chief judge and the division chiefs, the amount of salary is at the level many senior ALJs now receive.

d. *The Powers of the Council*

The powers of the corps' governing council are essentially the same as those now possessed by individual agencies over ALJs. The Heflin bill authorizes the council to change its divisions by reducing them to as few as four in number or increasing them to as many as ten.[352] This provision assures that the corps will possess maximum flexibility to promptly react to changing agency caseloads.

Professor Levinson expresses concern that this may give the council too much control over the balance between specialist and generalist tendencies which Congress should retain.[353] However, the corps will be subject to congressional oversight. Annual reports to Congress will be required. If the jurisdiction and number of the initial divisions were locked in place to await some future congressional action, the corps' flexibility and responsiveness to changing caseload requirements would be seriously hampered. Professor Levinson's alternate suggestion that Congress build a timetable of staggered effective dates into the legislation,[354] requires a present knowledge of future caseload changes which no one possesses. The approach of the Heflin bill allows needed action where inaction would otherwise be the result.

e. *Removal and Disciplining of Administrative Law Judges*

The Heflin bill provides for the removal, suspension, reprimand or disciplining of judges on the basis of incompetence, neglect of duties, or misconduct.[355] Judges may also be removed for physical or mental disability.[356]

Professor Levinson questions the enhancement of tenure provided by the bill's elimination of removals through reduction-in-force (RIF) actions.[357] He believes tenure of administrative law judges should not be enhanced until there is complete administrative reform which may make a difference in the total number of ALJs needed by the federal government.[358]

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[351] The importance of trial experience to the performance of the ALJ function is attested to by the poll of ALJs conducted by the General Accounting Office in 1977, *supra* note 145. They rated it as the most important factor in selecting the most qualified applicants and 73.1% assessed it to be the most important of their preparatory experiences.

[352] *See* S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 564).

[353] *See* Levinson *supra* note 327, at 747-48.

[354] *Id.* at 748.

[355] *See* S. 1275, 98th Cong., 1st Sess. § 2 (1983) (proposing codification at 5 U.S.C. § 569(a)(1)).

[356] *Id.*

The justification for the use of RIFs under the APA has always been questionable.[359] It offers an avenue for political action against those administrative law judges who happen to be both dissident and junior in service. Its use, coupled with veterans preference and a complex system of bumping rights, has no place in a judicial system that would attract highly qualified lawyers to make a mid-career change. RIFs seek out the elimination of the youngest, often the most talented people, who in the future, would have contributed the most. Furthermore, if seniority against RIFs is determined on a divisional basis, the ability to attract needed transfers between divisions will be complicated by consideration of the judge's seniority status in the new division as compared to the old.

Conversely, the elimination of RIFs means that a valuable resource will be retained. Divisional work reductions can be met by transfers between the divisions. The corps' power to accept and seek additional cases from federal agencies and courts desiring a decision on the record, would undoubtedly be employed by the corps' council in periods when overall caseloads decline. The expected general reduction in individual caseloads that the efficiency of the corps itself would achieve, should be offset by normal attrition which may be coupled with congressional restrictions on the corps' ability to replace judges who retire, return to practice, or otherwise leave the corps.

The Heflin bill further provides for the processing of complaints against the judges by panels of ALJs constituting a Complaint Resolution Board.[360] This system of peer review is similar to that now applicable to federal district court and circuit court judges.[361] Its prototype has been implemented by the Department of Labor to handle complaints involving administrative law judges and Chief Judge Nahum Litt of the Department of Labor advises that it has proven itself to be an effective instrument which the individual judges at his agency consider to be fair and appropriate.

Mr. Joost would modify these provisions to make " 'censure' by the corps the basic sanction in disciplinary cases."[362] He would also eliminate the existing statutory prohibition against performance evaluations of ALJs and have "the actual work of evaluation/performance appraisal be done by 'Ombudsmen' hired by the corps for a term of years as 'Inspectors General.' "[363] Mr. Joost cites the LaMacchia Committee study as support for these evaluation/performance appraisals which would lead to removal, suspension or reduction in grade for any judge concluded to have demonstrated "unacceptable performance."[364]

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[357] *See* Levinson *supra* note 327, at 753.

[358] *Id.*

[359] *See, e.g.*, *Ramspeck*, 345 U.S. at 144-45 (Black, J., dissenting).

[360] *See* S. 1275, 98th Cong., 1st Sess. § 2 (1983).

[361] *See* 28 U.S.C. § 372(C) (West Supp. 1983).

[362] *See* Joost *supra* note 327, at 709.

[363] *Id.* at 708.

[364] *Id.*

As contemplated by the LaMacchia Committee, the purpose of compiling performance data was to furnish ALJs feedback for self-appraisal. The resistance shown by administrative law judges and the bar to performance evaluations is principally grounded upon distrust of the motivations of agency employers who could selectively enforce data developed against dissidents. Informational feedback, therefore, could be implemented by the envisioned corps without attendant suspicion as to underlying motivation, but only if developed data is not used to facilitate subsequent censure actions by a Complaint Resolution Board. The Heflin bill proposes a Board made up of panels of ALJs who would investigate complaints of misconduct.[365] This Board could also counsel a judge who has problems which interfere with the effective performance of judicial duties. There is a vast difference, however, between approaches that lead to a troubled colleague being assisted and those which chiefly look to his censure.

f. Jurisdiction of the Proposed Corps and a Two Year Study, Division-by-Division, of Types and Levels of Agency Review

The jurisdiction of the proposed corps would extend to all cases under the APA. Additionally, jurisdiction would extend to those cases referred to the corps by an agency or a federal court desiring a decision based on a record developed at a hearing conducted by an administrative law judge.[366]

The Heflin bill further provides for a study by the corps' chief judge of the various types and levels of agency review to which the decisions by each division's ALJs shall be subject.[367] Two years after enactment of the bill, the Council would be required to report to the President and Congress the findings and recommendations of the study, including proposals for reform legislation, to make review of ALJs' decisions more efficient and meaningful and to give them greater finality.[368]

As Professor Levinson correctly points out, the creation of a corps requires a reexamination of thorny, jurisdictional questions respecting the finality of an ALJ's decisions and the way they are reviewed and treated by agencies and the courts. He questions the wisdom of deferring answers to these questions until after the corps is established.[369]

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[365] S. 1275, 98th Cong., 1st Sess. § 2 (1983).

[366] *Id.*

[367] *Id.* at § 3.

[368] *Id.*

[369] Although this is the last of the points Professor Levinson has raised which shall be discussed as part of the text of this article, he has raised others which are most provocative and deserve additional thought. For example, he suggests that it may be desirable to reserve to the corps the power to employ collegial decisionmaking by multi-judge panels. *See* Levinson, *supra* note 326 at 738. Here, it should be noted that many of this author's colleagues believe that multi-judge panels would be appropriate when disciplinary actions against a judge need be heard on behalf of the Merit Systems Protection Board. *See* ACUS recommendation *supra* note 124. Also, in the event a non-judge employee of the corps should file a grievance with the Federal Labor Relations Board, a multi-judge panel, perhaps consisting of or including retired judges, might be appropriate to avoid charges of judicial bias in favor of the corps. Professor Levinson also recommends, and this author agrees, that administrative law judges, upon becoming members of the corps, should be subject to an appropriate Judicial Code of Conduct.

In opting for a preliminary study by the corps itself, the Heflin bill would allow the status quo to be maintained until there is some future congressional action based on a completed study.[370] The approach of the Heflin bill to these issues appears correct and appropriate. The principal difficulty with fixing answers to the questions Professor Levinson raises, before the corps and its divisions are in place, is that there is no single, readily identifiable cure that can treat every aspect of the administrative process. Keeping in mind that the Heflin bill retains, albeit in a somewhat modified fashion, a specialized administrative process, the jurisdictional problems of each division will necessarily differ in significant ways.

Actions by ALJs in formal rulemaking proceedings, for example, probably should not be treated with the finality that may be afforded to their adjudications of adversarial cases. The divisional study that the Heflin bill requires the corps to conduct is therefore not a hollow gesture. The corps itself will be in the best position to develop and furnish the empirical data needed to develop solutions that are pragmatically sound.

A fresh, thorough study of each category of adminitrative adjudication conducted by the federal government is truly needed. Past studies have shown that administrative delays have been caused by agency assignment of review power to intermediate review boards; the use of interlocutory appeals; de novo review of facts; and multilayer review processes.[371] The extent to which such practices will continue once a corps is in place will need to be investigated. In addition, comparisons will have to be made to evaluate the benefits that accrue to those agencies which give ALJ decisions greater finality.

The envisioned study and report should, however, probe deeper than those conducted in the past. Specific evaluation is needed of the appropriate extent of agency reviews when benefit claims are in dispute and when an agency is enforcing regulations through its prosecution of civil penalty and other sanction cases.[372] Agency review in the latter type of case arouses particular concern that the functions of prosecutor and judge are improperly combined. Agency ability to retroactively establish policy to deny benefit claims or to punish violators on the basis of inarticulated standards is particularly susceptible to characterization as a "sort of ex post facto lawmaking."[373]

The way in which ALJ decisions are reviewed and, at times ignored, in formal rulemaking proceedings also requires new study and thought.[374] The Supreme Court rejected the "clearly erroneous" standard articulated by Judge

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[370] *See* S. 1275, 98th Cong., 1st Sess., § 3 (1983).

[371] *See supra* notes 138, 145-46 for a discussion of LaMacchia Committee study and the GAO reports. *See also* Davis, *A New Declaration of Independence for Administrative Law Judges*, 17 JUDGES JOURNAL 1 (1978).

[372] *See* Skoler, *The Changing Role of Administrative Law Judges: Time to Shift Gears*, 22 JUDGES JOURNAL 24 (1983). Mr. Skoler, former Deputy Associate Commissioner for Hearings and Appeals, Social Security Administration, argues that: "ALJ tribunals should emerge as true administrative courts whose benefit awards and enforcement determinations in individual cases are not subject, even theoretically, to agency dissent or reversal, but only to higher court review."

[373] *See* Skelly Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 590 (1972).

[374] For a comprehensive discussion of this subject, see Levinson, *The Proposed Administrative Law Judge Corps: An Incomplete But Important Reform Effort*, 19 NEW ENG. L. REV. 733 (1984).

Learned Hand for agency review of an administrative law judge decision. But, perhaps something close to it should now be made applicable by reform legislation.

Professor Kenneth Culp Davis has cautioned that a court's duty is to "review the agency's determination, not that of the administrative law judge."[375] It may be better, therefore, not to articulate a standard in terms of deference owed by the agency to an ALJ's decision, but rather the deference a court owes to an agency determination that has disregarded an ALJ's decision. Several years ago, Senator Dale Bumpers stirred the legal community by introducing an amendment to the APA which would have eliminated the favorable presumptions courts give to agency actions on review.[376] Perhaps the deference future courts give to agency determinations should be withheld from those actions that are not grounded on facts as found by ALJs.

Obviously, there are many questions which are difficult to resolve, but enactment of legislation to establish a corps should not be delayed until all the answers are found. The corps' creation is itself a desirable and most needed reform. Legislation to establish the corps should not be made dependent upon achieving a political consensus on these other controversial issues that will be better answered after the corps is in place and able to provide needed data.

VII. CONCLUSION

America has developed an administrative judiciary that has proven its capabilities in addressing complex economic regulatory issues and absorbing a staggering caseload which could have overwhelmed our courts. Still, essential questions must be answered. Is the present administrative judiciary really fair? Does it inspire public confidence? Does it fully protect Americans from the abridgement of their fundamental constitutional rights by well meaning agency officials who would disregard procedural safeguards in their eagerness to implement praiseworthy policies? "Indeed, one might fairly say of the Bill of Rights in general and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials."[377]

There are many reasons for enactment of legislation to establish ALJs as an independent, unified corps, but one is paramount. It will end the status of ALJs as agency employees, and better enable them to protect Americans from bureaucratic government that is more often efficient than fair.

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[375] *See* Davis *supra* note 6.

[376] *See* S. 67, 97th Cong., 1st Sess. (January 6, 1981).

[377] Stanley v. Illinois, 405 U.S. 645, 656 (1972).

The Federal Administrative Law Judges Conference

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June 6, 1986

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Senator Charles E. Grassley
Chairman
Subcommittee on Administrative
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United States Senate
Washington, D. C. 20510

Dear Senator Grassley:

My responses to your letter and questions of May 20, 1986, are as follows:

Question 1:

How can we quantify the cost savings from the Corps bill, in terms of greater efficiencies due to centralized functions and staffs, case tracking systems, office space, etc.? How would S. 673 "centralize" judges located outside Washington? Are judges located outside of Washington of any practical use to a "Corps" primarily based in Washington? If so, how?

Answer 1:

Judge Barlow has testified that there will be cost savings of at least 30 million dollars per year. This prediction is most conservative. Annual savings of fifty million dollars would be more consistent with the experiences of the States of Minnesota and New Jersey.

Judge Barlow's lower estimate was based upon a projected 20% reduction, through attrition, [1] in the total personnel that should be attained with the Corps in place [2]. However, the State Chief Judges who testified advised that they had experienced much greater reductions in staffs [3] than this 20% projection. Moreover, this estimate does not take into account the other savings that will result from centralization of functions, staffs, tracking systems, office space, etc. Chief Judge Parker testifed that whereas the overall spending by the State of New Jersey increased more than 100% during the eight years after that State's central panel system was initiated, contested case costs under the central panel system only increased by 24%; or less than one-fourth of what they would have been without it in place. Chief Judge Duane Harves testified at an earlier June 23, 1983 hearing of the Subcommittee, that in the State of Minnesota, which bills each user agency its share of central panel costs, user agency costs were cut in half within three years of centralization.

Therefore, overall annual savings of one-third, or fifty million dollars per year, may be anticipated predicated upon current caseload estimates.

DOL, NLRB, FTC, SEC, FMSHRC, OSHRC, Interior, and Coast Guard maintain separate offices outside Washington. In San Francisco and New York, for example, administrative law judges are separately housed by many of these agencies. Each have separate and underused law libraries, hearing rooms, conference facilities, etc. Administrative law judges in those cities could be more economically housed together in common facilities. Moreover, even though judges would be assigned to divisions, it is anticipated that judges primarily hearing Social Security cases would be assigned many of the short hearings which now require a judge to travel from Washington. Then, too, Washington based judges, when assigned to cases out-of-town, could additionally stay on an extra day or so and hear cases for another division suffering a backlog of cases in that region.

Question 2:

Will the Chief Judge under S. 673 have the authority to establish performance ratings or criteria for the Division Chiefs and the corps judges? If so, what limits should be placed on this authority?

Answer 2:

Administrative law judges have been protected from agency performance ratings by 5 U.S.C. § 5372. Inasmuch as performance ratings in the context of pay raises and promotions is mooted by the bill's provision for a single, universal ALJ salary, draftsmen of S. 673 proposed the repeal of the section as no longer needed. However, upon reflection, this section should be retained and revised to prohibit performance ratings and evaluations by the Chief Judge and the Council. This protection will still be needed to assure that administrative law judges are not pressured or intimidated by anyone concerning the decisions they enter. The judges will, of course, be subject to disciplinary proceedings initiated by specific complaints of misconduct or neglect of duty, as the bill currently provides, but they should not be subjected to periodic, institutionalized performance evaluations or ratings which impinge upon decisional independence. 4/

In specific respect to Divisional Chief Judges, the bill provides for a five year term and reappointment would, of course, involve a review of past performance as a Division Chief.

Question 3:

Under S. 673, who will be responsible for assigning cases within each Division: the Chief Judge of the Division alone? If so, would he consult with the relevant agency? Would "policy-sensitive" cases be treated differently than more "routine" cases?

Answer 3:

S. 673, in these respects, does not contain language as specific as that contained in H.R. 1213, the companion bill in the House.

Both bills place authority for case assignments in each Division Chief with oversight over exercise of this function reposed in the Council.

However, H.R. 1213 further provides in its section 568:

> ". . . Administrative law judges shall be assigned to cases within their division in rotation, to the extent practicable, except that any case involving a difficult or significant question of law, fact, or policy, shall be assigned to a judge possessing expertise in the subject matter involved."

The House bill also requires the Council, under its section 565(d)(15):

> "to make suitable arrangements for continuing judicial education and training for judges of the Corps and to provide for the training of other employees of the Corps, so that the level of expertise in the divisions of the Corps will be maintained and enhanced."

It is anticipated that the rules of practice adopted by the Council will be formulated in cooperation with the individual agencies and the Administrative Conference of the United States, and will contain specific provisions for agencies to request expedited hearings and identify those cases requiring different treatment than the "routine."

Respectfully yours,

Victor W. Palmer

Attachment

1/ In a speech delivered on September 9, 1984, Craig Pettibone, OPM's Assistant Director for the Administrative Law Judges Staffing Group, reviewed the ALJ staffing program and reported that the average age of ALJs was 55 years, with 17 years of federal service. He projected that by 1989, 640 administrative law judges, or over 60% of the total, would be eligible to retire. To assure that the Corps will reduce its size, section 563(c) of the bill provides for enforced attrition: "If the Council (in its annual report to Congress) recommends the appointment of an administrative law judge to add a new position to the Corps, or to fill a vacancy caused by retirement, resignation, removal or death of such judge, the chief judge shall submit information substantiating the need for such appointment."

2/ It presently costs approximately $150,000 per year to maintain an administrative law judge, or 150 million dollars per year overall, for the 1,000 employed throughout federal government. This is roughly equivalent to the 1981 cost of maintaining a federal magistrate which was half the cost of a district judgeship as reported to Congress that year by the Judicial Conference of the United States:

Expenses, October 1, 1981	District Judge	Full-Time Magistrate
Salary	$ 70,300	$ 53,500
Related employment benefit costs	3,850*	5,400
Supporting staff	115,300	47,300**
Miscellaneous office expenses:		
Initial cost	61,000	37,300
Annual recurring cost	32,000	14,700
Space and facilities:		
Initial cost	121,000	45,000
Annual recurring cost	83,000	28,000
Total:		
Initial cost	$371,450	$188,500
Annual recurring cost	304,450	148,900

*Does not include funds required for retirement of a district judge or of a district judge serving in senior status.

**Includes secretary and legal assistant.

3/ "Many more cases are being resolved (in New Jersey) by its 44 administrative law judges than were by the 130 hearing officers under the old system." See page 4 of Chief Judge Parker's prepared statement. "Since the inception of the office on January 1, 1976, the (centralized Minnesota) office has reduced its total staff by 40%. No hearing examiners have been laid off . . . but we have reduced (by attrition) the number of examiners by 27%." See page 6 of Chief Judge Harves June 23, 1983 prepared statement.

4/ Professor L. Harold Levinson, in reviewing the earlier version of this bill, raised specific concerns in these respects. "The corps . . . should not interfere in the ALJ's independent exercise of the decision-making power in any particular case. S. 1275 properly vests decisional jurisdiction in the ALJs, not in the ALJ corps. The corps is an administrative framework designed to guarantee the independence of the ALJs, not to control the manner in which the ALJs decide cases." Levinson, "The Proposed Administrative Law Judge Corps: An Incomplete But Important Reform Effort." 19 N. Eng. L.Rev. 733, at 751 (1984).

Senator HEFLIN. Judge Barlow, we will be delighted to hear from you now.

Judge BARLOW. Thank you, Senator Heflin. It is indeed my privilege to be here this afternoon representing the Association of Administrative Law Judges. As you know, that is the professional association of the judges who are assigned to the Department of Health and Human Services, Social Security Administration.

I will not read my full statement, it was rather lengthy, but I would like to outline certain points. I will not go into the organization of the corps bill because, as I am sure everyone is familiar with that.

I would like to emphasize what our association views as the important reasons for the need for an independent corps.

First, it seems that we are, perhaps missing an essential point, and that is, that the public, the people who come before the agencies, are entitled to the appearance of an impartial arbiter.

There have been many litigants before my agency, before Judge Palmer's agency, and as far as I know, before other agencies, who have refused to go forward with cases before administrative law judges because they feel that we are employed by the agencies and therefore we cannot be impartial.

It may be easy for a lawyer well-schooled in constitutional law to understand and believe that the APA protects independence. But in a system which is geared toward allowing many people to appear on a pro se basis, it is very difficult to make them understand, that while the seal of the department is over our heads, we can be totally independent.

In 1983, Senators Cohen and Levin issued a report as a result of hearings that they held in the Subcommittee on Oversight and Government Management, dealing with the issue of improper pressure on administrative law judges, and the Social Security Administration.

They found—and this is a quote from their report:

> SSA is imposing pressure through several means, including the inequitable and unjustified targeting of only allowance decisions and high-allowance judges who review pursuant to an amendment sponsored by Senator Henry Bellmon and passed in 1980, and the use of minimum production quotas, goals, and productivity.

They recommended the discontinuance of Bellmon activity completely. They recommended that SSA stop all managerial and administrative, and policy-related interference, or influence, either directly, or indirectly, with ALJ allowance rates, and also asked that the Judiciary Committees of the House and Senate review the propriety and legality of SSA's actions.

We find that as a result of the congressional inquiries, it was hoped that this pressure would stop, but that is not the case. We find that Bellmon is very much alive today. I submitted an exhibit to my statement, which is called a quality report, and while the focus of Bellmon has changed, the effect has not. Judges are being targeted and rated. In the quality report I submitted to you, was based on region 1 statistics, judges, by name, were given a rating for the quality of their decisions.

And how were they rated? According to the beginning of the report, they were rated by a hearing analyst's review of the decision and a recommendation to an appeals council member.

The report itself was done for every single region in the country as I understand. I have only seen the region 1 report which I have submitted to you.

But as you can see the breakdown is based on alleged accuracy, reasons for inaccuracy; yet no one has questioned the accuracy of appeals council decisions and they are routinely reversed by the courts.

It seems that the policy of targeting judges continues. We believe that the corps would eliminate that. You would have a system of management, by judges who are not party to the litigation, who have no interest in the outcome of the litigation; when there are legitimate management concerns for moving the docket based on case age, one could not turn to the judge who is asking you to move the case, and say, "I'm doing this because I need a consultative examination, or I need more evidence," and have the judge say to you, "Close the record."

In region 2 we have a regional chief judge who (I submitted a copy of a letter he sent to the judges in the region), indicated that because he does not use the subpoena to develop the record, the rest of us ought not to.

He recently appeared in my hearing office, and indicated that the judges who met the central office's—"standard for the norm"—would be given benefits and privileges, such as travel to other hearing offices. But because the hearing office that I serve in did not meet that norm, with respect to the aged case situation, we would not be given such benefits.

There were many, after he left our office, who felt that they would close cases out simply for the sake of closing them out. That serves neither the interest of government nor the interest of the claimant, because certainly, a full and fair development of the record is our obligation under the Administrative Procedure Act.

In terms of saving moneys for the trust fund, the time it takes to develop the record fully, and to result in an affirmation opinion, will ultimately save money; whereas the time it takes to develop the record in favor of a claimant, and pay benefits to someone who is deserved, will ultimately result in justice being served.

Experience tells us that the goals that SSA has set easily become quotas. Today, the goal is case age; how much time it takes to decide a case. We know that the U.S. Supreme Court, in the *Blankenship* case, held that timeframe quotas, could not be placed on the judges, yet in essence SSA is doing just that.

We see the same thing happening that happened with the productivity issue. Beyond that, SSA is now going through what is called functional teaming, which is another name for reconfiguration.

What has happened is that they have taken away all supervisory authority from the judges, and placed the authority for supervising the personnel in the hands of nonlegal, nonjudicial people.

The judges have been told that one of the reasons that this is being done is that we are not capable of rating and evaluating the people who work and are there to serve us; yet in today's day of Gramm-Rudman-Hollings, we have created a new middle-management hierarchy, where every hearing office has had to promote people from GS-5's to GS-7's in order to supervise the GS-5's and rate and evaluate them; promote GS-8's to GS-10's and GS-11's and GS-12's to supervise the GS-7's and GS-8's, to rate rank and evaluate; and promote the staff attorneys from GS-12's to GS-13's, to be supervisors.

Yet we are told that we, as judges, GS-15's, most of whom have had supervisory experience in the past, are not capable of performing that task. And what this functional teaming has done is, it has taken case control from the judges, so that we no longer have the authority to manage the case.

We do not know whether our directions are being followed, and in one hearing office, I know that this results in adjournments being granted by clerks rather than judges. In another hearing office, in mine in particular, there was a recommendation that the hearing assistants who prepare the record for us go ahead and arrange for expert witnesses without even consulting the judges, whose responsibility it actually is.

This program is leading to more and more management by nonjudicial officers, in a way that will ultimately deprive the claimant of the APA hearing.

The Federal Administrative Law Judge Association recently condemned this policy, saying, in a recommendation, that it impedes the decisional autonomy and functional independence of the administrative law judges, as well as denying claimants due process.

We find, unlike what the representative of the Justice Department has said, many, many instances of a clearcut showing of bias on the part of judges.

I see my time is up. I would like to make one point. Case law has shown repeatedly, judges who seem to deny claims where the facts are in favor of the claimant, and one U.S. district court judge recently said:

> If this is the case, it should stop. There is no room in our system of justice for Nazi or Soviet type misuse and abuse of judges, and no ALJ should be exposed or succumb to such pressures.

I think Judge Greene, in her decision in the law suit that my association brought against the administration, made it pointedly clear, the evidence was there, the pressures are there; they are still there; they have not changed.

To solve the situation only with Social Security is to solve only a part of the situation. We must deal with the ALJ corps as a whole, and, for that reason, I urge that the corps measure be enacted. Thank you.

[The statement follows:]

PREPARED STATEMENT OF JOYCE KRUTICK BARLOW

Members of the Committee:

It is my privilege to appear before you on behalf of the **Association of Administrative Law Judges** to address you on a bill which may well become one of the greatest contributions to the American system of justice in this era. I refer, of course, to Senate Bill 673, "**The Administrative Law Judge Corps Act**".

Introduction

When the bill was initially introduced, it was the hope of those who supported it that the difficulties engendered by those individuals who must look to the Administrative Judiciary to redress breaches of federal regulations would be greatly reduced. On June 13, 1984, this Subcommittee favorably reported the same bill (then S. 1275) and requested that it be placed on the agenda with all due speed.

Almost two years later, there have been no changes which would mandate a different result. In fact, certain events which will be discussed at length have created an atmosphere most conducive to the passage of this measure during the current session of Congress.

The Bill: A Summary of Its Provisions

The creation of a **Unified Corps of Administrative Law Judges** staffed by all those Administrative Law Judges currently in office is the end product of this legislation. The Corps would be comprised of all the Judges presently assigned directly to approximately 29 federal agencies, and presided over by a **Chief Administrative Law Judge** in conjunction with the **Council of the Corps** (the policy-making body of the Corps). A minimum of four and a maximum of ten divisions would be created to which judges would be assigned according to their areas of specialization.[1]

The responsibilities of the Chief Administrative Law Judge would include making written reports to the President concerning the business of the Corps during the preceding fiscal year, as well as presiding over the Council of the Corps. It would be the function of the Council to transact day to day business by a vote of a majority of all the members of the Council. Its areas of responsibility would include the hiring of judges, filing of disciplinary actions against judges, adoption of rules of practice, issuance of regulations concerning the conduct of business, determining general Corps policy, and to appoint and employ support staff. Ancillary powers such as the power to enter into contracts, and provide for continuing judicial education, are also included in the appropriate portion of the bill.

A judicial " Nomination Commission " is provided for with stringent guidelines set forth for the selection and appointment of a Chief Judge. It would be this commission's responsibility to report to the President with a list of three individuals found to be qualilfied for the position.

The appointment and transfer of judges is clearly set forth in Section 567, and jurisdiction is set forth in Section 568. With respect to jurisdiction, in essence the Corps would hear and decide the very same cases now heard by Administrative Law Judges assigned to individual agencies, as provided for by the Administrative Procedure Act.

Provisions for removal and discipline of judges are contained in Section 569.[2] For the first time, criteria for this controversial area are set forth in a clear and concise manner.

Lastly, the bill provides for a review and report on the progress of each division, in consultation with the Chief Judge, Division Chief of the reporting division, as well as the appropriate agency (and others specified), and, appropriate measures to transfer all existing staff, employees, facilities, etc., from the agencies to the Corps.

Why an Independant Corps? Is there a real need?

A reorganization of the administrative judiciary into a unified corps would provide the public with an assurance of the independance of the Judge, as well as saving substantial sums of money.

Most recently, the issue of independance has been the topic of serious consideration within the Department of Health and Human Services - Social Security Aministration. However, it is by no means confined to this agency. Not too long ago, a judge in one of the regulatory agencies told of a litigant who appeared before him pro se and in effect refused to proceed because that judge was employed by the very agency who was seeking to impose sanctions against the litigant. In the same context, a litigant before the Department of Agriculture said of an unfavorable Administrative Law Judge decision "I think it was because he does work for the Department of Agriculture. He felt a lot of pressure. He was on the Department of Agriculture team. You always vote with your team don't you? He wasn't a bipartisan judge. He is an administrative Judge for the Department of Agriculture."[2a] The **American Bar Association**, in its Canons of Judicial Conduct, requires a judge to avoid even the appearance of an impropriety. It is difficult for most laymen to comprehend that a judge employed by the very agency that is a party to the litigation can and will be impartial and fair. The fact that in past few years the Social Security Administration has been embroiled in front page publicity, which casts in doubt the independance of the administrative judiciary, has made it even more difficult for the laymen to accept the concept.

It is abundantly clear that the most eggregious conduct concerning inteference with decisional independance has occurred within the Social Security Administration. In September 1982, the Associate Commissioner introduced a program which was designed to work with the Bellmon review. It was known as a feedback program. As one Judge described it in his testimony in a Joint Hearing of the House Subcommittee on Social Security and the Senate Special Committee on Aging held on March 24, 1984 in Hot Springs Arkansas, "It would be a system whereby individual ALJ's would be advised of their 'decisional weaknesses,' and provided with a 'mechanism for long-term improvement.' [The] memorandum provided for a timetable for improvement, failing improvement within certain steps and after certain training and counseling, the memo promised that 'other action would be taken."[3] As early as 1980, the Administration began discussing with Judges in Ft. Smith, Arkansas the fact that they had significantly higher allowance rates than other offices in their area.[4] At a trial in the United States District Court for the District of Columbia, (in the winter of 1984) two Judges in the Fort Smith hearing office testified that the Deputy Director of the Office of Appeals Operations informed them that the only way to be free of the agency's continual peering over their shoulder was to lower their reversal rates (then in the 90% range) to the national average of 45-55%.[5] The decision in this litigation written by the Hon. Joyce Hens Green, is perhaps one of the most significant documents in support of the need for an independant corps of administrative law judges. In her words:

> ...the evidence as a whole, persuasively demonstrated that defendants retained an unjustifiable preoccupation with allowance rates, to the extent that ALJs could reasonably feel pressure to issue fewer allowance decisions in the name of accuracy. While there was no evidence that an ALJ consciously succumbed to such pressure, in close, cases, and, in particular, where the determination of

> disability may have been based largely on subjective factors, as a matter of common sense, that pressure may have influenced some outcomes.[6] (emphasis added)

There can be no doubt that the original intent of Congress was to create an administrative judiciary which while employed by the agencies it serves was expected to maintain its decisional independance. The experience of the past few years has amply demonstrated that employment by the very agency whose cases one must decide is inconsistent with decisional independance.[7] In 1981, the Judicial Administration Division of the ABA published a report entitled **THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE.** In discussing the independance of the administrative law judge, one portion of the report stated:

> It is not too much to say that due process would require, if the independence of the trier of facts is tainted, that no weight or effect whatever be given to his decisions. A decision by a judge who is under the influence of one of the disputants would lack the most elementary basis of actual or apparent fairness.[8]

If the general public is to be well served by the administrative judiciary, then its independance must be assured by severing the Judges' employment from the agencies.

The Corps - An Efficient and Cost Effective Management System

At the present time, each agency employing Administrative Law Judges functions entirely on its own. Thus at periods of peak case load, agencies are often faced with the need to hire new judges and staff to support those judges. In fact, the Social Security Administration recently hired 36 new judges in order to fill vacancies created by retirments and transfers of a number of judges to the Department of Labor. On the other hand, during periods of low receipts in requests for hearing, the judges in a particular agency may have little work. At the present time there is no efficient means by which the talents of those judges without sufficient work can be utilized to assist a sister agency. The interagency loan program is burdensome and time consuming in that it requires contract negotiations between agencies for the loan of judges, and extensive recordkeeping regarding judges' and staff members' time so that payment may be made from the borrowing agency to the agency lending the judges. During a twenty month period from October 1983 to June 1985, the Social Security Administration detailed 177 Judges to 16 different agencies.[9] (While such details have taken place, the administraive procedures employed to accomplish the temporary transfer of judges has proved to be extremely difficult and cumbersome to use.) The establishment of a "Unified Corps" would eliminate the necessity for bureaucratic red tape when one agency's case load was heavy while another's was light. The Chief Judge would have the power to assign a judge to another division with little more needed than a memorandum, and perhaps travel orders. The expense of tracking time and resources would be eliminated, as would bickering over the "value" of the judge's time. While no figures are available as to what the actual cost of the current practice is, there can be no doubt that substantial savings can be had by the establishment of the Corps.

It is estimated by our Association, and the **FEDERAL ADMINISTRATIVE LAW JUDGE CONFERENCE** that an overall savings of some thirty (30) million dollars per year will be the net result of the Corps. This figure is predicated upon the fact that the expense to maintain a judge including salary, office space, staffing, and travel costs amounts to $150,000 per judge. There are currently approximately one thousand judges. Considering the current rate of attrition, and the ability to move the judges at will, rather than rehire due to attrition, we arrive at the figure of approximately thirty million dollars per year.

While some critics have assailed the legislation because it provides for a single salary, this in and of itself would not increase the cost of maintaining an administrative judiciary. The explanation for this is a simple one. Most of the judges currently serving are at the maximum salary level, and thus there would be no increase in salary. For those few who would benefit by an increase, the additional cost would be more than made up for by the savings resulting from a more efficient use of personnel.

As a management tool, the Corps has the potential for eliminating one of the greatest areas of controversy, docket management. There can be no question about the fact that much of the controversy in the Social Security System arose as a result of management's push commencing in 1976 for increased productivity of the judges (In 1979, the House SubCommittee on Social Security, chaired by Mr. Pickle reported that due process had suffered by the push for productivity. In a similar report several years later, Senators Cohen and Levin made the same findings). Productivity is, of course, a justifiable concern. No court system in this country is ever free from the pressing weight of the ever growing backlog. Issue after issue, we find articles in the **Judges' Journal** (a publication of the American Bar Assn., Judicial Administration Division) dealing with case managment and reduction of backlog and delays. The difficulty arises when those seeking to manage the docket are in fact parties to the litigation. There is a fine line between efficient operation of an agency, and improper and undue pressure on a judge from the agency. How can one tell whether the pressure to quickly dispose of a case is due to justifiable concerns for speedy case processing, or rather to a party who would like to see it concluded before the judge probes too deeply during the process known as development of the record. Implementation of the **Corps** increases judicial accountability, since the officials to whom the trial judge will be accountable are other judges who are not parties to the litigation.

Unfounded Criticism

Criticism of the Corps Bill stems from the concerns of a dissident minority among the judges in regulatory agencies that their case load is so complicated that only those steeped in the particular field's law can handle these matters. Such concerns are without merit.

The structure of the Corps provides for divisions which follow the lines of the current agency structure, and require that staffing be handled with due consideration given to the areas of specialization of the particular judge.

Even if such a provision were not contained in the bill, the argument falls flat. The administrative judiciary has often been termed "functionally comparable" to the Article III judges. These were the very words used by the United States Supreme Court, in describing the position of Administrative Law Judge.[10] What is most interesting about the comparison is that on the whole, the selection process for the position of Administrative Law Judge is a more rigorous one than for the position of U.S. District Court Judge. When seeking a position on the District Court, the applicant does not have to pass a competitive examination. The applicant for the position of Administrative Law Judge does. The Administrative Law Judge selection process is designed to insure that only the most highly qualified applicants are placed in the position. The varied backgrounds of our Judges correspond to the backgrounds of the Judges sitting in the District Courts. In fact, many Administrative Law Judges have in prior times been Judges of Courts of General Jurisdiction in their home states. Many have also served in several different agencies. One never hears a criticism that a U.S. District Court

Judge whose prior background is limited to criminal litigation is not qualified to hear a complex multi district law suit involving securities fraud! Once appointed and confirmed, he or she is presumed to have the capacity to absorb and comprehend matters of law in all fields of practice. Why then should there be such a distinction for the Administrative Law Judge? Remember, it is the District Court Judge who hears appeals from all the agencies regardless of the nature of the claim. Just as they are qualified to hear the full spectrum of cases, so too are the highly qualified Administrative Law Judges, no matter what their background or area of expertise.

In support of this contention, let us examine the breakdown of HHS Judges detailed to other agencies from October 1983 to June 1985. In so doing, bear in mind that HHS Judges hear cases involving the Social Security Administration and Health Care Financing Administration, but, that approximately 90% of the caseload involves disability issues. Also bear in mind that a large number of HHS Judges transfered to HHS from other agencies when the agency in which they had previously served was disbanded. (eg. ICC, OSHA, etc) Leading the list with the largest number of Judges detailed is the FDIC. Fifty five HHS Judges were assigned to hear complex banking matters. Forty nine Judges heard cases for the Comptroller of the Currency, nineteen for the Department of Labor, nineteen for the Department of Education, nine for the Federal Reserve, six for the Federal Home Loan Bank Board, six for the Department of Treasury, three for the Department of Transportation, two for the Civil Rights Review Authority, two for the Consumer Product Safety Commission, two for the National Credit Union Association, and one each for the Army Corps, NLRB, Interstate Trade Commission, Department of Commerce, and the Commodity Futures Trade Commission. If HHS Judges were not fully competent to hear the complex matters arising from these agencies case loads, surely the individual agency would not have accepted their services.

Proposed Changes in the present draft

A thorough review of the bill has led this Association to propose several changes which we feel will ultmately result in greater efficiency.

At present, the seven divisions named include two divisions whose work deals with issues of Health: division two and five. In order to assure that all cases currently heard by Judges in a single agency remain within the same division, we propose to eliminate the word **HEALTH** in the description of division two, and place it into division five so that this division would read **"Division of Health and Benefits Programs"** . In keeping with the bill's intent to retain specialization wherever possible this will allow for the retention of Health Care Financing Administration cases with the Judges who currently hear them (and who have received specialized training for the purpose).
While it is recognized that the bill provides for the continued use of Judges according to their area of expertise, it is also clearly the intent that in order to accomodate work load and other managerial needs, Judges be reassigned either on a temporary or permanent basis. However, it is the opinion of this **ASSOCIATION** that the intent to permit such transfers be more clearly stated. Thus it is suggested that Section 564(a) be ammended to add the following sentence between lines 11 and 12: Notwithstanding such considerations, all judges may be required at any given time depending on personnel needs, to serve in a division other than the one closest to his or her area of specialization.

Concerning the issue of transfer of a Judge's permanent duty station, there is some concern that a Judge may be required to uproot himself or herself, as well as family based upon nothing more than a written explanation of the need for such reassignment. Therefore it is suggested that Section 567(c) line

25 be ammended to include the following sentences. Any Judge so notified may submit objections in writing to the Council within 20 days after receipt of the notification of reassignment. The Council shall be required to give due consideration to the Judge's objections and render a written acceptance or rejection. If in the Council's determination, the Judge's objections must be overruled and the reassignment be effectuated, the Judge shall be entitled to a due process hearing and decision prior to effectuation of such transfer before the Merit Systems Protection Board on the issue of such reassignment, accompanied by appropriate appeallate rights as in the case of removal or suspension.

In past years some agencies have indicated that they might well remove their cases from administrative law judge consideration were the **Corps Bill** to be passed. To insure protection to all those litigants entitled to an APA hearing before an administrative law judge, we propose an ammendment to Section 568 (c)(1) and 568 (c)(2). Thus it is recommended that this section be ammended to add subdivision (c)(3) which would read as follows: Nothing contained in Section 568 (c)(1) or (c)(2) shall be construed to permit the withdrawal from consideration by an administrative law judge or failure to assign to an administrative law judge any matter which may ultimately result in the payment of benefits to an individual or individuals.[10a]

Another area of grave concern is that portion of the bill which deals with removal and discipline of judges. It is the recommendation of this **ASSOCIATION** that Section 569(a)(1) be ammended to remove the word "incompetence". In support of this recommendation, we must digress into a brief historical analysis.

Accountability of the judiciary has been a heated issue since the earliest days in our Country's history. In 1803, Congress sought to impeach Judge John Pickering, who sat on the United States

District Court for the District of New Hampshire. While Judge Pickering had committed no crime, he was both insane and an alcoholic. How might removal of a judge appointed for life subject to good behavior be accomplished when no crime had been committed? The only method by which this could be accomplished would be to loosely construe the impeachment clause. Thus, Senator Giles of Virginia suggested that :

> "Impeachment is nothing more than the enquiry, by the two Houses of Congress, whether the office of any public man might not be better filled by another....A trial and removal of a judge need not imply any criminality or corruption in him."[11]

Having successfully convicted Judge Pickering of high crimes and misdemeanors, Congress went on to tackle the problem of Mr. Justice Samuel Chase. The issues in the Chase case went further than the very personal issues in the Pickering matter. Mr. Justice Chase was to be impeached for his actions in connection with his handling of three judicial matters. Congress was in fact split on the question of whether to impeach based upon criminal conduct or rather to impeach simply because it disapproved of his conduct. Unable to resolve the conflict the two theories were intermixed, and the end result was that Mr. Justice Chase was found not guilty. In the words of one eminent author:

> "The failure of the Chase impeachment is one of the signal events in the history of the federal judiciary, because it set a precedent against loose construction of the impeachment power and thus supported the doctrine of judicial independence. ... Throughout the nation's future history this lesson can be read again and again: ... [12]

What is apparent from an examination of these two landmark cases is that too loose a construction of the judicial removal provisions can ultimately result in a perversion of the system.

The law as it stands today provides for an administrative law judge to serve as a career appointment subject to removal for "good cause".[13] While the Courts have recognized that there is some difference between this standard and "good behavior" "To date there has not been a final administrative or judicial determination that good cause to discipline an ALJ pursuant to 5 U.S.C. 7521 could be established solely upon proof of poor performance."[14] Should Congress adopt this legislation as written, the door for such removal actions may well be opened. To allow this as a basis for removal is far too subjective a standard. A perfect example of this is the case of Judge Goodman (cited above). The Social Security Administration sought his removal due to the fact that his average productivity rate was 15.6 dispositions per month whereas the national average was 32. At that point in time, Judge Goodman was clearly below the national average. However, today, in a time of reduced case load his monthly average would be within range of the national average. Thus what may be "poor performance" at one point in time may not be "poor performance" in another. Ultimately, the final decision of the Merit Systems Protection Board was that based upon the evidence adduced, good cause for removal had not been demonstrated. (An interesting aside relative to this matter is the fact that Judge Goodman accumulated bills of $235,000.00 for attorney fees for the defense of this action, yet notwithstanding the favorable decision, his application for fees under the Equal Access to Justice Act and the Civil Service Reform Act was summarily denied on June 19, 1985.)

Considering the history of the Social Security Administration in its vigilant pursuit of these MSPB actions one must be wary of providing language which may be subject to abuse.

If one were to look more closely at the word "incompetency" it would be readily apparent that its inclusion in this section of the bill is redundant. "Incompetent" is defined in common usage as "of inadequate ability or fitness".[16] In law it is defined as "lack of ability, legal qualification or fitness to discharge the required duty".[17] The bill provides that a Judge may be removed for physical or mental disability. Thus inadequate fitness is covered by this provision. Since discipline may be imposed in the form of removal, suspension or reprimand due to misconduct or neglect of duty, these provisions cover the broad spectrum of lack of ability to perform the duty (A lack of legal qualification is not an area of concern due to the rigorous competitive examination process required for qualification and appointment). Additionally, the screening process is well designed to weed out those who are not capable of performing the job duties. The insertion of the word "incompetence" is therefore unnecessary.

Let us again read the lesson of the Chase impeachment and consider it along with the fact that the word "incompetency" creates a whole new area for undue pressure on the administrative law judge. Loose construction of the impeachment clause in the Chase case might well have changed the future course of the judicial history of this country, much to its detriment. Given the opportunity to provide a measure which will insure quality adjudications of administrative matters, we ought not to provide the ammunition to destroy either the quality of those decisions or the independence of the judge.

Conclusion

The history of this great nation demonstrates that we are not afraid of the challenge of social change. The time has come to take a very great step forward to reform a system which has grown to proportions most likely not anticipated by those who created it. That the change is warranted cannot be doubted. The great weight of the evidence supports this urgent need. That this measure is the correct one also cannot be doubted. It provides a cost effective method to insure decisional independence, judicial accountability, and unbiased caseload management. This **ASSOCIATION** urges its passage with appropriate ammendments as previously stated.

Respectfully submitted,

Joyce Krutick Barlow

JOYCE KRUTICK BARLOW,
U.S. Administrative Law Judge,
on behalf of the **ASSOCIATION**
OF ADMINISTRATIVE LAW JUDGES

FOOTNOTES

1. At a later point in this presentation a suggestion will be made for modification of the structure as it now exists in the present bill.

2. The issue of removal will be discussed at length infra.

2a. Denver Post, Sunday August 25, 1984, Sect. C p. 1.

3. Testimony of Judge David Hubbard, S. Hrg. 98-773 Part 3, p. 286. See also ASSOCIATION OF ADMINISTRATIVE LAW JUDGES v. HECKLER, Mem. Op. Green, J. Sept 10, 1984, (U.S.D.C.,DC - Civ. Action No. 83-1024)

4. ASSOCIATION OF ADMINISTRATIVE LAW JUDGES v. HECKLER, supra.

5. ASSOCIATION OF ADMINISTRATIVE LAW JUDGES v. HECKLER, supra.

6. ASSOCIATION OF ADMINISTRATIVE LAW JUDGES v. HECKLER, supra.

7. Annexed are three memorandums which are examples of such inteference. In one, the Regional Chief Judge of Region II impliedly sought to impose his own practice of not developing a record on other ALJ´s by urging that the subpoena power not be used. In a more recent memorandum, a supervisorary staff attorney sought to instruct hearing assistants on the use of vocational experts, suggesting that the hearing assistant make the decision as to when to use such an expert, thus bypassing the Judge. Lastly, while unintentional, one Hearing Office Chief Judge put pressure on the Judges to get that hearing office "out of the basement" on aged cases.

8.The Improvement of the Administration of Justice, 6th ed, 1981, p. 295.

9 The breakdown of these details will be treated infra.

10. BUTZ v. ECONOMU, 483 U.S. at 513.

10a. An argument has been made that if the agencies do not have control of the judges, they won't have control over policy. It is to be noted however, that the judges assigned to the Corps will still be bound by agency policy so long as it is in keeping with the law. If agency policy is not in consistent with the law, then certainly it should not be applied. We are sure however, that the agencies will be so pleased with this system (as the agencies in the State of New Jersey have been) that this eventuality will not occur.

11. McCloskey, The American Supreme Court, Univ. Chicago Press,

1960, at p. 45.

12. Ibid., at p. 47.

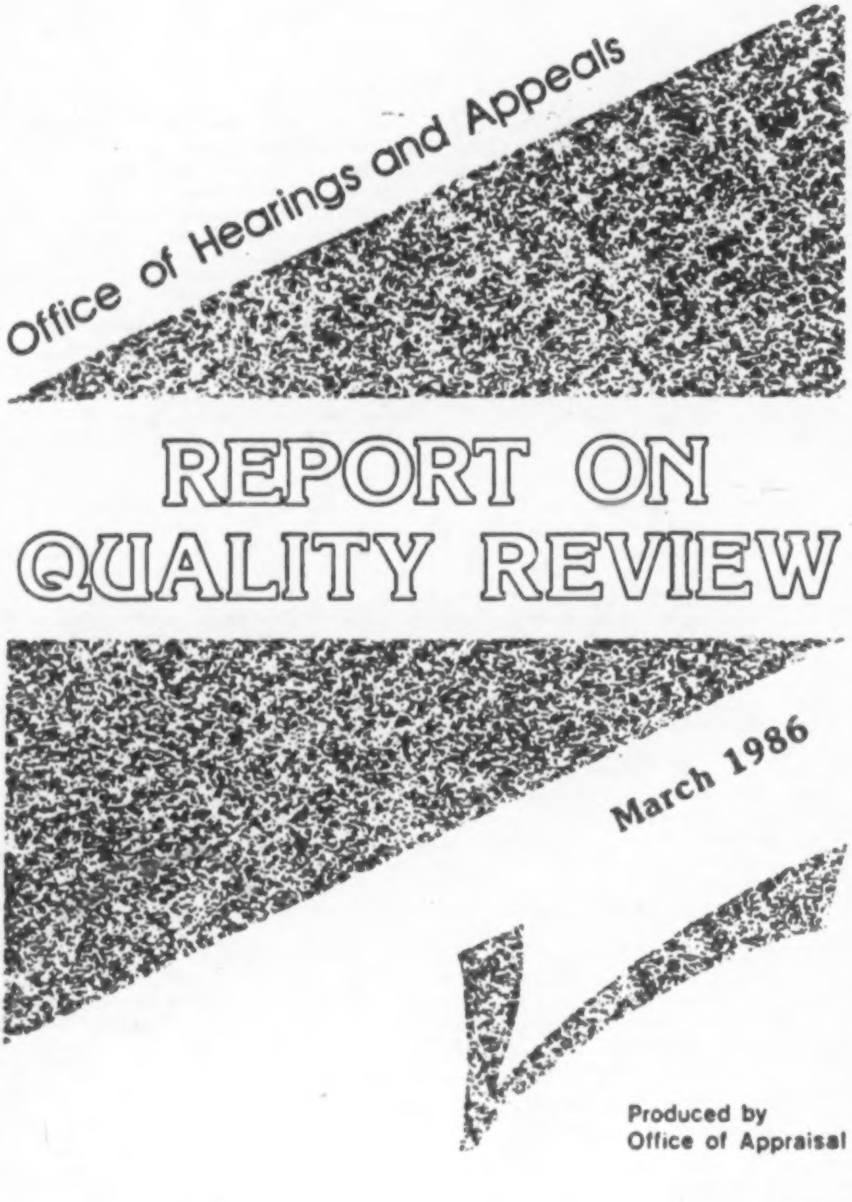
13. 5 U.S.C. 7521(a)

14. SSA-DHHS v. GOODMAN, MSPB Doc. #HQ75218210015, 1984 a p. 5.

15. Ibid.

16. The Scribner-Bantam English Dictionary, Revised Ed. p. 458.

17. Black's Law Dictionary, 14th Ed. p. 906.



Office of Hearings and Appeals

REPORT ON QUALITY REVIEW

March 1986

Produced by
Office of Appraisal

REPORT ON QUALITY REVIEW

PREFACE

Section 304(g) of Public Law 96-265, (the "Bellmon Amendment"), enacted June 9, 1980, directs that: "The Secretary of Health and Human Services shall implement a program of reviewing, on his own motion, decisions rendered by administrative law judges as a result of hearings under section 221(d) of the Social Security Act ...," (i.e., hearings on disability and blindness determinations under title II and/or title XVI of the Act).

Own motion pre-effectuation review, at this time, includes a national random sample of disability allowance decisions which are selected for review by the Office of Disability Operations (ODO) mailroom personnel according to the terminal digits of the social security number at the time the cases are received from the hearing offices (HOs). ODO immediately forwards the identified title II cases to OHA's Office of Appraisal (OA) where controls are established. The claim folders are then referred for decisional review by hearings and appeals (H&A) analysts in the Office of Appeals Operations (OAO). In addition, a national random sample of title II disability issue unappealed affirmation decisions, also identified on the basis of the terminal digits of the social security number, are selected by Docket and Files personnel in OHA Central Office as the claim files are received. These cases are also sent to OA for case control then referred to the H&A analysts for review. Both types of decisions are subjected to comprehensive evaluation to determine whether the conclusions reached by the Administrative Law Judge (ALJ) conform to the Social Security Act and Regulations. When it appears that a decision may not meet the appropriate criteria, the case is referred to the Appeals Council (AC) for consideration under its own motion authority. A Quality Review (QR) form identifying the major types of deficiencies found in the decision accompanies the H&A analyst's own motion recommendation which is sent to the AC. Upon completion of Council action, further information is recorded on the QR form to reflect the AC decision. The QR form is then detached from other claims material and forwarded to OA where the data is entered into the automated QR system. The attached series of charts is derived in part from such data, and in part from data in the OHA case control system or records maintained in the OAO review components in those instances when the AC action is not fully completed on the QR form.

QR also includes information captured by H&A analysts during their review of cases in which claimants request that the AC review unfavorable (affirmation) disability issue hearing decisions. Because of resource limitations, current reporting for these appealed affirmation decisions is limited to a random sample of cases.

INTERPRETATION OF QR INFORMATION

Below we have briefly described the content of the QR monthly report. This report is divided into five sections: 1) overview of ALJ decisional quality; 2) appealed affirmations—reasons for AC remand; 3) appealed affirmations—reason for AC reversal; 4) allowances—reasons for AC remand; and 5) allowances--reason for AC reversal. Although each segment is designed to provide unique information relevant to a particular issue, the result is an overall depiction of ALJ decisional quality.

The source of QR data is the forms completed by the OAO analysts during their review of the claim files. When QR forms are received in OA, claim files often are no longer available in OHA; therefore, OA can neither complete nor correct the data. As a consequence, the problem of incomplete information may at times be reflected in this report. All data entered into the OA Datapoint computer for the fiscal year as of the reporting date is included.

1) Overview of ALJ Decisional Quality

This section is designed to provide an "at a glance" summary of ALJ accuracy rates for the three current review classifications—appealed affirmations, allowances, and unappealed affirmations.

To obtain the accuracy rate for each review category necessitates several operations: 1) OAO recommendations for own motion/grant review are subtracted from the total cases reviewed to obtain the number of incorrect ALJ decisions; 2) the number of AC denials of own motion/grant review are then subtracted from the number of incorrect ALJ decisions to obtain the actual number of incorrect decisions; 3) this figure is then subtracted from the total number of cases reviewed; and 4) the result is then divided by the number of cases reviewed to obtain the accuracy rate. A ".0" accuracy rate indicates that although one or more cases have been reviewed, final AC action is unknown.

The composite accuracy involves the same calculations as described above, modified to obtain an overall accuracy rate.

During these computations, one factor that is discounted is the involvement of new and material evidence. To the extent that it exists and played a role in the remand and reversal actions, both the composite accuracy rates and the appealed affirmation accuracy rates would be increased.

2) Appealed Affirmations—Reasons for AC Remand

This section is intended as a source of information regarding what actions the AC requires of the ALJ subsequent to a remand. It should be noted that the AC may require more than a single action; therefore, the numbers of reasons for remand may exceed the total number of cases reviewed.

HIGHLIGHTS

For this reporting period the national accuracy rate was 92.0 percent, overall. This was based on a cumulative sample of cases—27,123 appealed affirmations, 7,588 allowances, and 1,501 unappealed affirmations. Region IV continues to lead with 93.8 percent overall accuracy followed by Region VII with 92.8 percent.

Appealed Affirmations

- The national accuracy rate was 92.5 percent for appealed affirmations with a range from 94.3 percent (Region VII) to 88.0 percent (Region I).
- The most frequent single reason for remand was to obtain existing evidence (39.3 percent). A combined total of 40.9 percent of the cases that were remanded required the ALJ to obtain either expert vocational or medical witness input.
- Nationally, 31.5 percent of the Appeals Council (AC) reversals were based on the finding that claimants met Listing criteria. An additional 14.7 percent were reversed because claimant impairment(s) equaled Listing criteria. In 20.6 percent of the reversals a Vocational Rule directed a finding of disabled.
- New and material evidence involvement at the AC level was a factor in 18.5 percent of the AC remands and 24.9 percent of its reversals.

Allowances

- The national accuracy rate was 88.8 percent for allowances with a range from 91.8 percent (Region IV) to 84.3 percent (Region VI).
- The most frequent reason for remand was to obtain a consultative examination (54.5 percent).
- Own motion reversals were based on the AC's finding that the claimant met the criteria of a Vocational Rule which directed a conclusion of not disabled 31.8 percent of the time while 30.8 percent were reversed because the claimants had the ability to perform their past relevant work.

Unappealed Affirmations

- The national accuracy rate was 98.0 percent for unappealed affirmations.

OVERVIEW OF ALJ DECISIONAL QUALITY

This section is designed to provide an "at a glance" summary of ALJ accuracy rates for the three review categories—appealed affirmations, allowances, and unappealed affirmations.

1) Appealed affirmations—An approximate 50 percent random sample of title II disability issue QR forms received subsequent to OAO review excluding all cessation cases reviewed during FY 1985 plus 100 percent of forms completed by OAO analysts during the first four months of FY 1986.

2) Allowances—An approximate 15 percent random sample of title II disability issue ALJ decisions issued during FY 1985 plus the first five months of FY 1986.

3) Unappealed affirmations—An approximate 2 percent national random sample of title II only denial cases were included for this review category. The report includes all of FY 1985 plus the first five months of FY 1986.

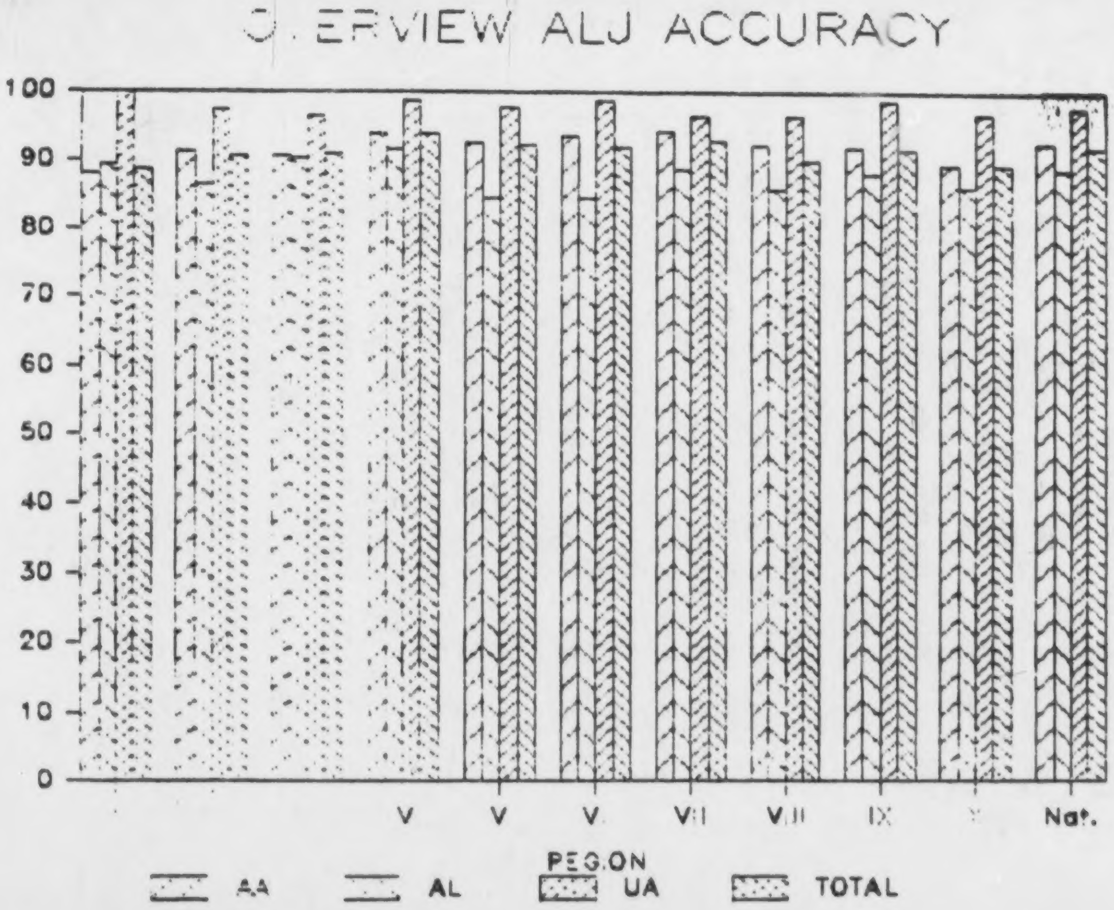
The accuracy rates are computed as follows:

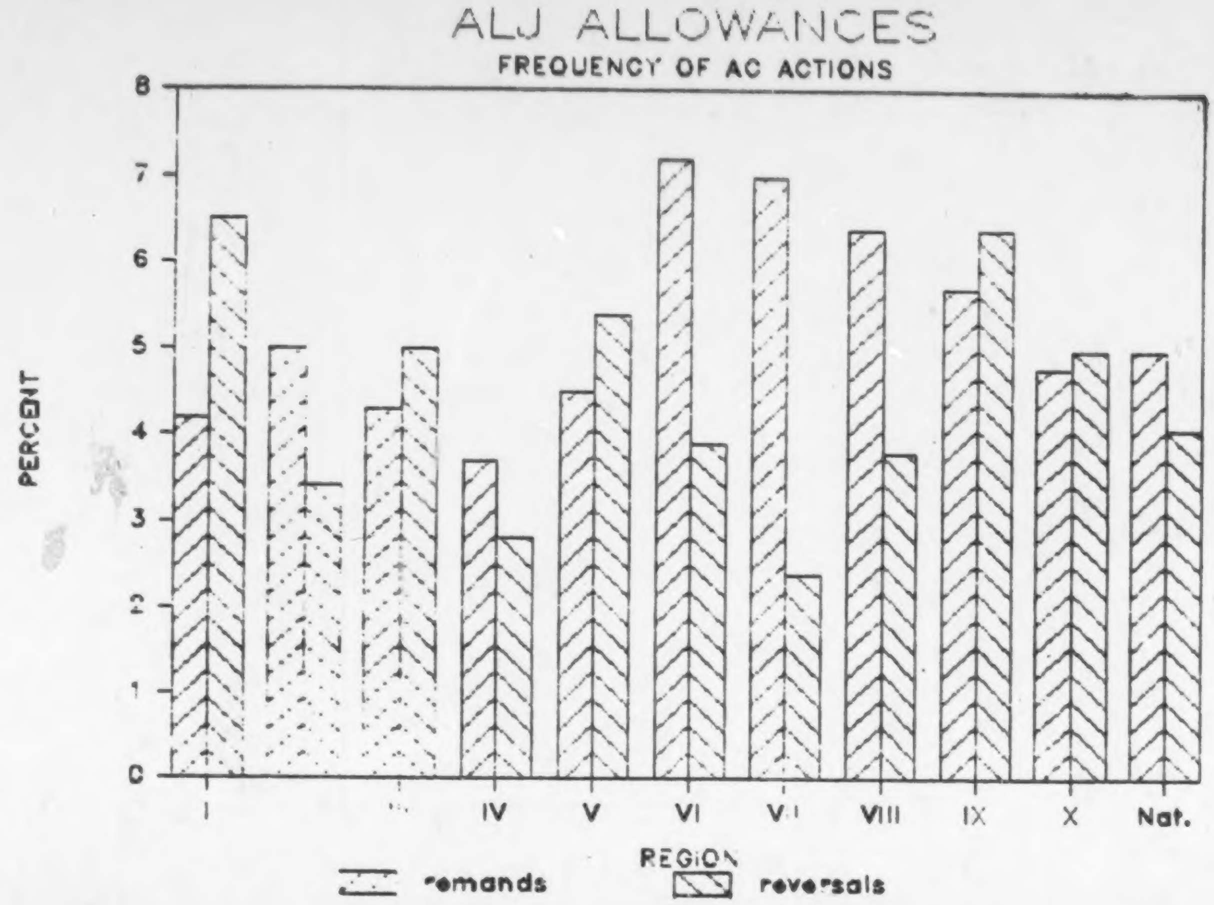
1) Number of GR/OM recommendations minus the number of AC denials equals the number of incorrect decisions.

2) Number of cases reviewed minus the number of incorrect decisions equals the number of correct decisions.

3) Number of correct decisions divided by the number of cases reviewed multiplied by 100 equals the accuracy rate.

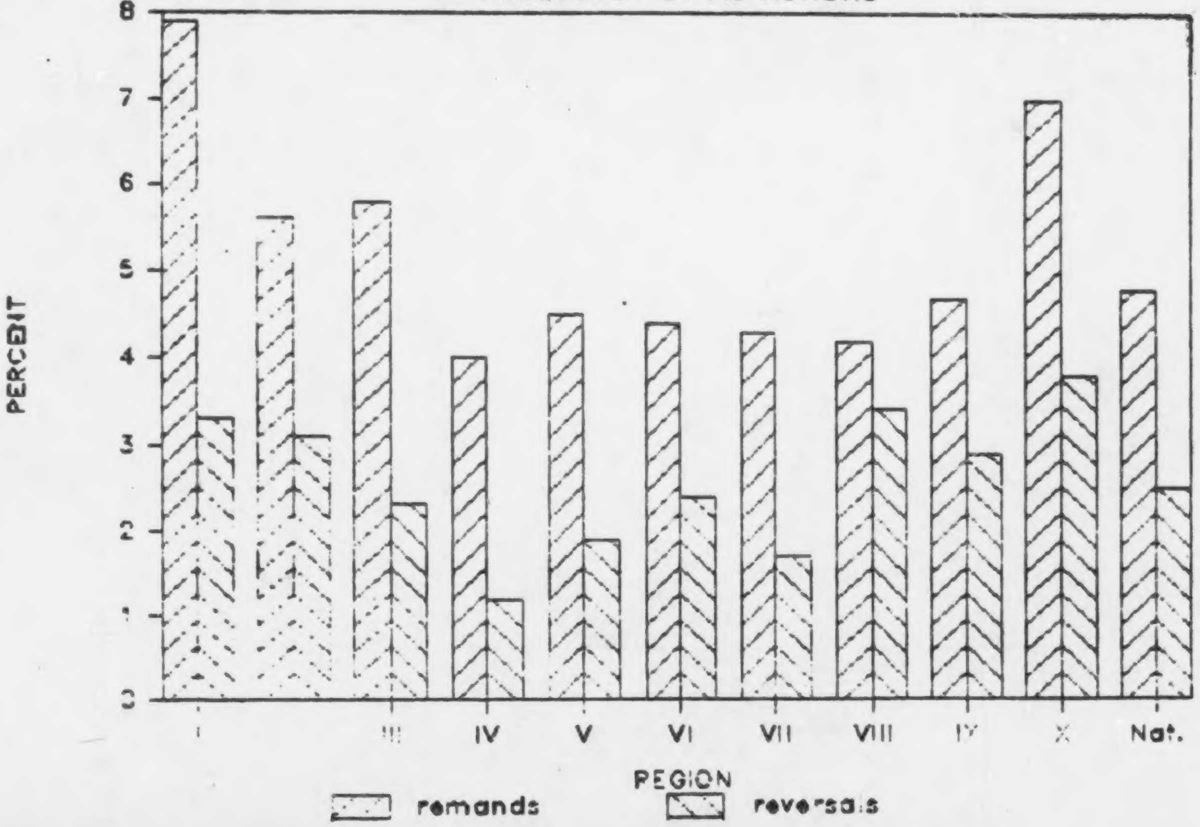
The composite accuracy rate represents the proportion of the total number of cases reviewed for all categories that were correct.


OVERVIEW ALJ ACCURACY
100
90
80
70
60
50
40
30
20
10
0
V
V
V
VII
VIII
IX
X
Nat.
REGION
AA
AL
UA
TOTAL


ALJ ALLOWANCES
FREQUENCY OF AC ACTIONS
PERCENT
0
1
2
3
4
5
6
7
8
I
IV
V
VI
VII
VIII
IX
X
Nat.
REGION
remands
reversals

APPEALED AFFIRMATIONS

FREQUENCY OF AC ACTIONS



OVERVIEW OF
ADMINISTRATIVE LAW JUDGE
DECISIONAL QUALITY

	APPEALED AFFIRMATIONS		ALLOWANCES		UNAPPEALED AFFIRMATIONS		COMPOSITE
	CASES REVIEWED	ACCURACY RATE	CASES REVIEWED	ACCURACY RATE	CASES REVIEWED	ACCURACY RATE	ACCURACY RATE
NATIONAL	27125	92.5	7588	88.8	1501	99.0	92.0
REGION I	811	88.0	259	89.2	33	100.0	88.7
BOSTON MA	222	85.[redacted]	112	87.5	10	100.0	86.3
DACEY,K T	15	[redacted]	10	100.0	2	100.0	92.6
GREENBERG,R	41	[redacted]	1	100.0	1	100.0	74.4
HASSENFELD,B L	13	100.0	11	81.8			91.7
JOHN,M	10	100.0	11	90.9			95.2
KELLY,R J	22	[redacted]	15	96.7			81.1
LAEZZA,N J	31	[redacted]	10	90.0	1	100.0	85.7
MCGRIMLEY,T J	18	[redacted]	14	57.1	1	100.0	69.7
MURPHY,J	11	100.0	10	80.0	2	100.0	91.3
OBRIEN,W JR	13	100.0	7	100.0			100.0
PIERCE,U	33	[redacted]	8	100.0	2	100.0	88.4
SWEENEY,J T	15	93.3	15	100.0	1	100.0	96.8
HARTFORD CT	107	87.9	12	100.0	5	100.0	89.5
BEAUCHEMIN,J	64	[redacted]	7	100.0	2	100.0	89.0
BISCOE,C F	24	91.7	5	100.0			93.1
FISHMAN,S	19	[redacted]			3	100.0	86.4
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

[redacted]w ALJ may include NRS and special review cases

PREPARED BY OA/UPR MARCH 1986

OVERVIEW OF ADMINISTRATIVE LAW JUDGE DECISIONAL QUALITY

	APPEALED AFFIRMATIONS		ALLOWANCES		UNAPPEALED AFFIRMATIONS		COMPOSITE
	CASES REVIEWED	ACCURACY RATE	CASES REVIEWED	ACCURACY RATE	CASES REVIEWED	ACCURACY RATE	ACCURACY RATE
NEW HAVEN CT	80	88.8	13	92.3	2	100.0	89.8
KANELL,S	35	88.6	1	100.0			88.9
KICZUK,C J	16	100.0	8	87.5	1	100.0	96.0
SMERALDI,A J	29	82.8	4	100.0	1	100.0	85.3
OHCALJ BOSTON	1	100.0					100.0
SATTEN,E C	1	100.0					100.0
PORTLAND ME	107	82.2	41	85.4	7	100.0	83.9
POWELL,T	20	90.0	19	78.9	2	100.0	85.4
RAMANO,M A	40	82.5	4	100.0	1	100.0	84.4
TYMINSKI,A	47	[redacted]	18	88.9	4	100.0	82.6
PROVIDENCE RI	140	96.4	52	94.2	5	100.0	95.9
GALLAGHER,R J	16	87.5	17	94.1	2	100.0	91.4
JAFFE,R	46	97.8	6	100.0	1	100.0	98.1
KENNEDY,T P	22	95.5	6	100.0			96.4
MCGINN,V P	28	100.0	13	92.3	1	100.0	97.6
RYAN,D P	28	96.4	10	90.0	1	100.0	94.9
SPRINGFIELD MA	36	86.1	5	100.0	1	100.0	88.1
LUSSIER,E F	36	86.1	5	100.0	1	100.0	88.1

**New ALJ may include NRS and special review cases

PREPARED BY OA/OPR MARCH 1986

APPEALED AFFIRMATIONS--REASONS FOR AC REMAND

This section is intended as a source of information regarding what actions the AC required of the ALJ on remand. Since the AC may require more than a single action, the numbers of reasons for remand may exceed the total number of cases remanded; therefore, total percentages may also exceed 100 percent.

We have also examined the impact of new and material evidence. Whenever there was new and material evidence involvement, the entry appears preceded by an asterisk a second time on the table. This second entry defines the number and percentage of cases with new and material evidence.

The calculations of percentages are as follows:

Entry 1:

1) Percentage remanded equals the number of remands divided by the number of appealed affirmations reviewed multiplied by 100.

2) Percentage for each reason for remand equals the number for each reason divided by number of remands multiplied by 100.

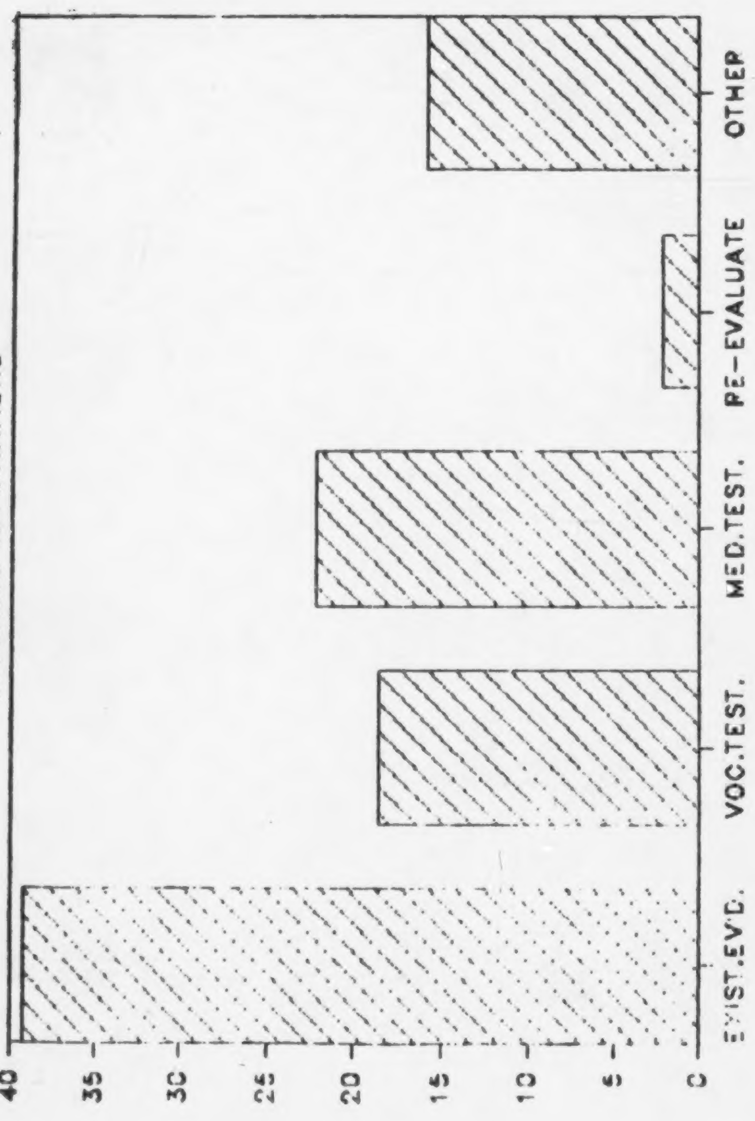
Entry 2 (only new and material evidence):

1) Percentage remanded with new evidence equals the number remanded with new evidence divided by the number remanded multiplied by 100.

2) Percentage for each reason for remand with new evidence equals the number with new evidence for each reason divided by the number for that reason multiplied by 100.

REASONS FOR AC REMANDS

APPEALED AFFIRMATIONS



ADMINISTRATIVE LAW JUDGE
DECISIONAL QUALITY

APPEALED AFFIRMATIONS
REASONS FOR APPEALS COUNCIL REMAND

	REMANDS		CONSULTATIVE EXAMINATION		EXISTING EVIDENCE		VOCATIONAL TESTIMONY		MEDICAL TESTIMONY		RE-EVALUATE RECORD		OTHER	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%
NATIONAL	1312	4.8	0	.0	515	39.3	244	18.6	293	22.3	28	2.1	208	15.9
*NATIONAL	243	18.5			146	28.3	97	39.8	32	10.9	5	17.9	12	5.8
REGION I	64	7.9			22	34.4	12	18.8	13	20.3	3	4.7	19	29.7
*REGION I	11	17.2			3	13.6	5	41.7	1	7.7			2	10.5
BOSTON MA	19	100.0			4	21.1	3	15.8	3	15.8	1	5.3	9	47.4
*BOSTON MA	3	15.8					1	33.3					1	11.1
DACEY,K T	1	6.7			1	100.0	1	100.0						
GREENBERG,R	7	17.1			2	28.6	2	28.6					3	42.9
*GREENBERG,R	2	28.6			1	50.0	1	50.0					1	33.3
KELLY,R J	4	18.2			1	25.0			1	25.0			3	75.0
LAEZZA,M J	2	6.5							1	50.0			1	50.0
MCGRIMLEY,T J	2	11.1											1	50.0
PIERCE,U	2	6.1							1	50.0	1	50.0	1	50.0
SWEENEY,J T	1	6.7												
*SWEENEY,J T	1	100.0												
HARTFORD CT	7	100.0			3	42.9	4	57.1	1	14.3			2	28.6
*HARTFORD CT	1	14.3					1	25.0						
BEAUCHEMIN,J	4	6.3			1	25.0	3	75.0	1	25.0			1	25.0
*BEAUCHEMIN,J	1	25.0					1	33.3						
BISCOE,C F	1	4.2			1	100.0	1	100.0						
FISHMAN,S	2	10.5			1	50.0							1	50.0
[redacted]	[redacted]				[redacted]		[redacted]		[redacted]				[redacted]	

**New ALJ may include NHS and special review [redacted]

*New and material evidence involvement.
Multiple remand reasons cause total percents to exceed 100%.

PREPARED BY OA/UPR MARCH 1986

ADMINISTRATIVE LAW JUDGE
DECISIONAL QUALITY

APPEALED AFFIRMATIONS
REASONS FOR APPEALS COUNCIL REMAND

	REMANDS		CONSULTATIVE EXAMINATION		EXISTING EVIDENCE		VOCATIONAL TESTIMONY		MEDICAL TESTIMONY		RE-EVALUATE RECORD		OTHER	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%
NEW HAVEN CT	5	100.0			4	80.0	1	20.0	1	20.0				
*NEW HAVEN CT	1	20.0												
KANELL,S	2	5.7			1	50.0								
*KANELL,S	1	50.0												
SHERALDI,A J	3	10.3			3	100.0	1	33.3	1	33.3				
PORTLAND ME	13	100.0			2	15.4	1	7.7	3	23.1	1	7.7	4	30.8
*PORTLAND ME	2	15.4					1	100.0					1	25.0
RAMANO,R A	5	12.5					1	20.0					2	40.0
*RAMANO,R A	1	20.0					1	100.0						
TYMINSKI,A	8	17.0			2	25.0			3	37.5	1	12.5	2	25.0
*TYMINSKI,A	1	12.5											1	50.0
PROVIDENCE RI	3	100.0												
GALLAGHER,R J	1	6.3												
KENNEDY,T P	1	4.5												
RYAN,D P	1	3.6												
SPRINGFIELD MA	4	100.0			2	50.0			3	75.0	1	25.0		
*SPRINGFIELD MA	1	25.0							1	33.3				
LUSSIER,E F	4	11.1			2	50.0			3	75.0	1	25.0		
*LUSSIER,E F	1	25.0			1	50.0			1	33.3				

**New ALJ may include NRS and special review cases

*New and material evidence involvement.
Multiple remand reasons cause total percents to exceed 100%.

PREPARED BY OA/OPR MARCH 1986

APPEALED AFFIRMATIONS—REASON FOR AC REVERSAL

This section provides insight into the reason behind the AC decision to issue a decision favorable to the claimant after the ALJ had issued a denial. Although in most instances only a single reason is required for an AC reversal, GAO analysts sometimes reported that more than one reason existed.

The impact of new and material evidence is shown both overall for reversals and for each reason. The second entry for a region, hearing office, etc., shows the number and percent of cases with new and material evidence involvement.

The calculations of percentages are as follows:

Entry 1:

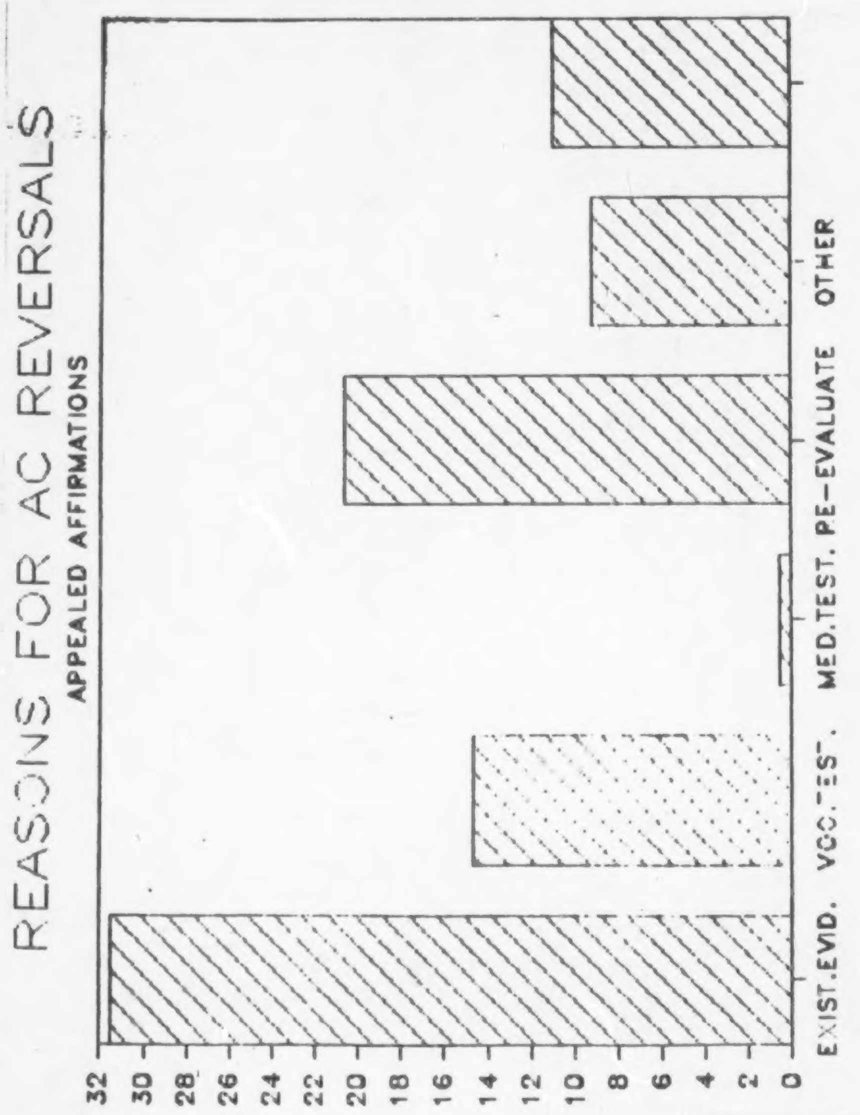
1) Percentage of reversals equals the number of reversals divided by the number of appealed affirmations reviewed multiplied by 100.

2) Percentage for each reason for reversal equals the number for each reason divided by the number of reversals multiplied by 100.

Entry 2 (only new and material evidence):

1) Percentage of reversals with new evidence equals number of reversals with new evidence divided by the number of reversals multiplied by 100.

2) Percentage for each reason for remand with new evidence equals the number for each reason divided by the number for that reason multiplied by 100.


REASONS FOR AC REVERSALS
APPEALED AFFIRMATIONS
32
30
28
26
24
22
20
18
16
14
12
10
8
6
4
2
0
EXIST.EVID.
VOC.TEST.
MED.TEST.
PE-EVALUATE
OTHER

ADMINISTRATIVE LAW JUDGE
DECISIONAL QUALITY

APPEALED AFFIRMATIONS
REASONS FOR APPEALS COUNCIL REVERSAL

	REVERSALS		MEETS LISTING		EQUALS LISTING		404.1562 416.962		RULE		FRAMEWORK OF RULES		OTHER	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%
NATIONAL	666	2.5	210	31.5	98	14.7	4	.6	137	20.6	61	9.2	73	11.0
*NATIONAL	166	24.9	61	29.0	39	39.8			18	13.1	11	18.0	16	21.9
REGION I	31	3.8	9	29.0	6	19.4			4	12.9	1	3.2	5	16.1
*REGION I	11	35.5	3	33.3	4	66.7								
BOSTON MA	14	6.3	4	28.6	2	14.3			3	21.4	1	7.1	2	14.3
*BOSTON MA	4	28.6	1	25.0	1	50.0							1	50.0
DACEY,K T	1	6.7							1	100.0				
GREENBERG,R	4	9.8	1	25.0	1	25.0			1	25.0				
*GREENBERG,R	1	25.0												
KELLY,R J	1	4.5	1	100.0										
LAEZZA,N J	3	9.7			1	33.3							2	66.7
*LAEZZA,N J	2	66.7			1	100.0							1	50.0
MCGRIMLEY,T J	2	11.1	1	50.0					1	50.0				
PIERCE,G	3	9.1	1	33.3							1	33.3		
*PIERCE,G	1	33.3	1	100.0										
HARTFORD CT	5	4.7	4	80.0	1	20.0								
*HARTFORD CT	2	40.0	2	50.0										
BEAUCHEMIN,J	4	6.3	3	75.0	1	25.0								
*BEAUCHEMIN,J	2	50.0	2	66.7										
BISCOE,C F	1	4.2	1	100.0										
NEW HAVEN CT	3	3.8	1	33.3					1	33.3			1	33.3
*NEW HAVEN CT	1	33.3											1	100.0
KANELL,S	1	2.9											1	100.0
*KANELL,S	1	100.0											1	100.0
SMERALDI,A J	2	6.9	1	50.0					1	50.0				

**New ALJ may include NRS and special review cases

*New and material evidence involvement.

PREPARED BY OA/DPR MARCH 1984

ADMINISTRATIVE LAW JUDGE
DECISIONAL QUALITY

APPEALED AFFIRMATIONS
REASONS FOR APPEALS COUNCIL REVERSAL

	REVERSALS		MEETS LISTING		EQUALS LISTING		404.1562 416.962		RULE		FRAMEWORK OF RULES		OTHER	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%
PORTLAND ME	6	5.6			2	33.3								
*PORTLAND ME	3	50.0			2	100.0								
PONFU.,T	2	10.0												
RAMANO,N A	2	5.0			2	100.0								
*RAMANO,N A	2	100.0			2	100.0								
TYMINSKI,A	2	4.3												
*TYMINSKI,A	1	50.0												
PROVIDENCE RI	2	1.4			1	50.0							1	50.0
*PROVIDENCE RI	1	50.0			1	100.0								
GALLAGHER,R J	1	6.3			1	100.0								
*GALLAGHER,R J	1	100.0			1	100.0								
JAFFE,H	1	2.2												1	100.0
SPRINGFIELD MA	1	2.8											1	100.0
LUSSIER,E F	1	2.8											1	100.0

**New ALJ may include HRS and special review cases

*New and material evidence involvement.

PREPARED BY OA/DPR MARCH 1986

ALLOWANCES--REASONS FOR AC REMAND

This section provides information regarding the reasons that the AC remanded favorable ALJ decisions. The fact that multiple remand reasons can exist in a single case causes the total number of reasons to exceed the number of remands.

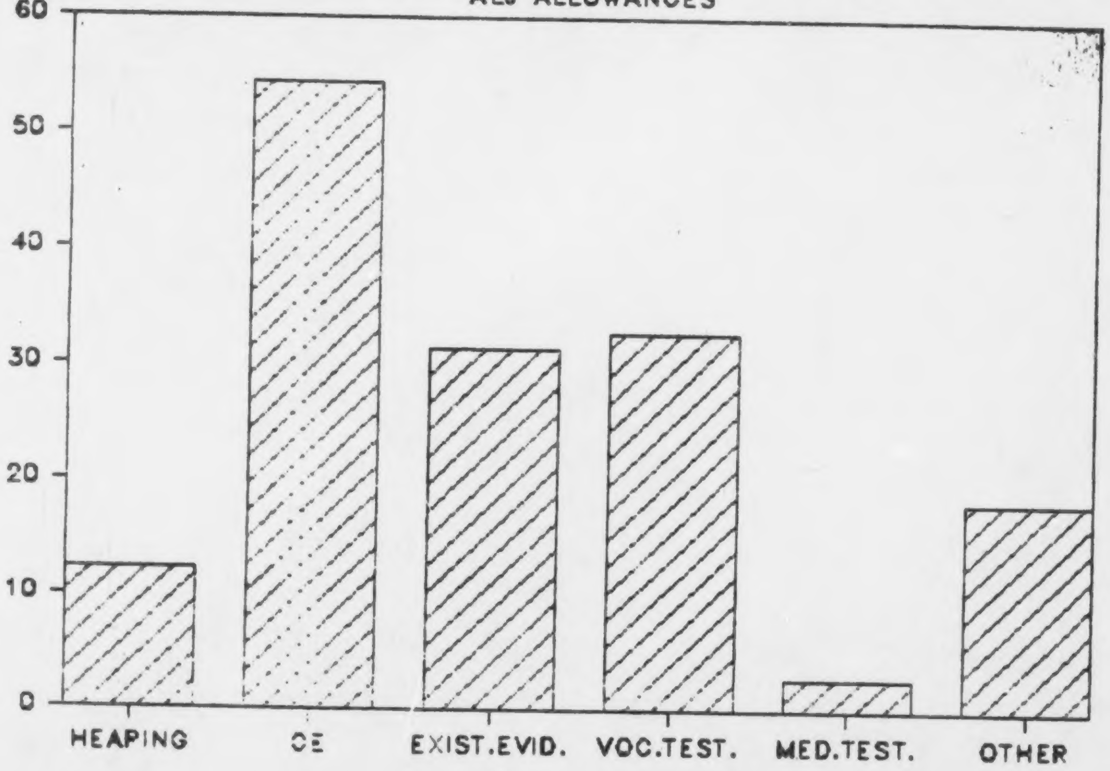
Percentages are computed as follows:

1) Percentage remanded equals the number of remands divided by the number of allowances reviewed multiplied by 100.

2) Percentage for each reason for remand equals the number for each reason divided by the number of remands multiplied by 100.

REASONS FOR AC REMANDS

ALJ ALLOWANCES



ADMINISTRATIVE LAW JUDGE
DECISIONAL QUALITY

ALLOWANCES
REASONS FOR APPEALS COUNCIL REMAND

	REMANDS		HEARING		CONSULTATIVE EXAMINATION		EXISTING EVIDENCE		VOCATIONAL TESTIMONY		MEDICAL TESTIMONY		OTHER	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%
NATIONAL	378	5.0	47	12.4	206	54.5	119	31.5	124	32.8	11	2.9	69	18.3
REGION I	11	4.2	2	18.2	5	45.5	5	45.5	2	18.2			3	27.3
BOSTON MA	7	6.3	1	14.3	3	42.9	5	71.4	1	14.3			2	28.6
HASSENFELD,B L	2	18.2	1	50.0					1	50.0				
JOHN,M	1	9.1			1	100.0	1	100.0						
MCGRINLEY,T J	3	21.4			1	33.3	3	100.0					2	66.7
MURPHY,J	1	10.0			1	100.0	1	100.0						
NEW HAVEN CT	1	7.7	1	100.0										
KICZUK,C J	1	12.5	1	100.0										
PORTLAND ME	2	4.9			1	50.0			1	50.0			1	50.0
POWELL,T	2	10.5			1	50.0			1	50.0			1	50.0
PROVIDENCE RI	1	1.9			1	100.0								
MCGUINN,V P	1	7.7			1	100.0								

**New ALJ may include NRS and special review cases

Multiple remand reasons cause total percents to exceed 100%.

PREPARED BY OA/DPR MARCH 1986

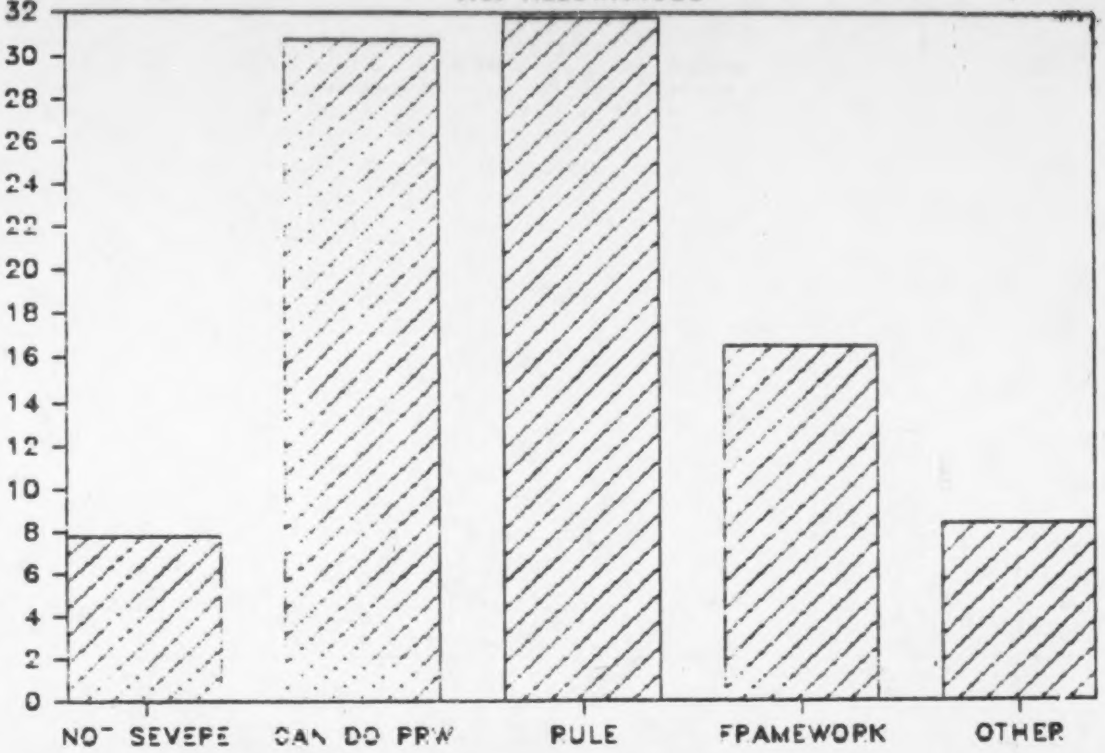
ALLOWANCES--REASON FOR AC REVERSAL

This section provides information regarding the reason that the AC reversed ALJ favorable decisions. Although only a single reason for reversal is necessary, in a few instances, the analysts indicated multiple reasons; therefore, the total number of reasons may exceed the number of reversals.

Calculations are performed as follows:

1) Percentage of reversals equals the number of reversals divided by the number of allowances reviewed multiplied by 100.

2) Percentage for each reason for reversal equals the number for each reason divided by the number of reversals multiplied by 100.


REASONS FOR AC REVERSALS

ALJ ALLOWANCES

ADMINISTRATIVE LAW JUDGE
DECISIONAL QUALITY

ALLOWANCES
REASONS FOR APPEALS COUNCIL REVERSAL

	REVERSALS		ENGAGED IN SGA		NO SEVERE IMPAIRMENT		CAN DO PAST WORK		RULE		FRAMEWORK OF RULE		OTHER	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%
NATIONAL	309	4.1	0	.0	24	7.8	95	30.8	98	31.8	51	16.6	26	8.4
REGION I	13	5.0	0	.0	1	7.7	2	15.4	6	46.2	1	7.7	1	7.7
BOSTON MA	4	3.6							2	50.0	1	25.0		
KELLY,R J	1	6.7							1	100.0				
LAEZZA,N J	1	10.0												
MCGRIMLEY,T J	1	7.1									1	100.0		
MURPHY,J	1	10.0							1	100.0				
[redacted]	[redacted]						[redacted]		[redacted]					
PORTLAND ME	4	9.8			1	25.0			3	75.0				
POWELL,T	2	10.5			1	50.0			1	50.0				
TYMINSKI,A	2	11.1							2	100.0				
PROVIDENCE RI	2	3.8											1	50.0
GALLAGHER,R J	1	5.9											1	100.0
RYAN,D P	1	10.0												

**New ALJ may include NRS and special review cases

PREPARED BY OA/DPR MARCH 1986

RESOLUTION OF
FEDERAL ADMINISTRATIVE LAW JUDGE CONFERENCE
REGARDING
FUNCTIONAL TEEMING AND/OR RECONFIGURATION
IN
OHA-SSA HEARING OFFICE STRUCTURE

RESOLUTION

Final

adopt
by FAL
apri

WHEREAS:

1. **The Social Security Act contemplates that decisions by administrative law judges in disability cases will be individualized determinations based on evidence adduced at hearings regulated and controlled by the judge.**

2. **The administrative Procedure Act and the decisions of the courts contemplate a hearing and proceeding controlled by the judge from the time a case is assigned until an initial decision is issued.**

3. **The Supreme Court has held that administrative law judges have an obligation in a case where a claimant is unrepresented by counsel to inform themselves of facts relevant to their decisions and to learn the claimant's own version of those facts.**

4. **The aforesaid "duty of inquiry" derives from the claimants' basic statutory and constitutional right to due process in the adjudication of their claims, including a de novo hearing.**

5. **The duties and obligations of an administrative law judge are "functionally comparable" to that of all other federal judges.**

6. **Administrative law judges are, under the decisions of the Congress and the Supreme Court, required to hear and decide cases coming before them in accordance with their own understanding and conscience.**

7. **Congress has repeatedly rejected the establishment of quotas and mandatory deadlines in the processing of disability cases.**

8. **Congress has recognized that the time needed to make well-reasoned, sound, quality-crafted hearing decisions takes precedence over any policy designed to encourage the mass production of decisions.**

9. **In 1980 Congress amended §'405(b) of Title 42 to require that every initial determination of ineligibility contain an easily understandable discussion of evidence and reasons for a disability determination.**

10. Congress has expressed concern that undue emphasis on the mass production of decisions has produced a marked loss of quality and uniformity in the agency decisions.

11. The Supreme court has found that administrative law judges should be afforded sufficient time to deliberate to ensure accurate decisions, and to schedule new consultative exams if additional evidence is required.

12. Frank V. Smith, III, Associate Commissioner, Office of Hearings and Appeals, Social Security Administration, has established a concept known as the "reconfiguration" policy (also know as "functional teaming," "field office organizational structure," or "model hearing office" policy).

13. The aforesaid "reconfiguration" policy removes from administrative law judges supervision and control over their support staff, i.e., (1) hearing clerks, (2) hearing assistants, and (3) legal assistants, and places responsibility for their selection and performance in non-judicial managers.

14. The replacement of the staff's individual accountability to the judge is designed to ensure the mass production of decisions to meet management quotas.

15. The establishment of production quotas for staff attorneys and lay assistants and the setting of a minimum of cases to be heard on trips away from the hearing office interferes with the conscientious exercise of judges' responsibilities.

16. The setting of numerical quotas on support staff pressures judges to meet quotas established by management without regard to the differences in individual cases.

VITIATE

17. By his policy memoranda of November 20 and December 21, 1984, the Associate Commissioner of OHA, SSA has established a program that tends to [redacted] the ability of administrative law judges to make independent decisions.

18. The "reconfiguration" policy impedes the decisional autonomy and functional independence of administrative law judges, as well as the due process right of claimants to receive individualized, well reasoned, sound, quality-crafted decisions.

THEREFORE IT IS NOW HEREBY RESOLVED: that the President of the Federal Administrative Law Judges Conference communicate to Frank V. Smith, III, Associate Commissioner, Office of Hearing and Appeals, Social Security Administration our deep concern that the policy of reconfiguration interferes with the decisional independence of administrative law judges and the due process rights of Social Security claimants, tax payers and others interested in a fair hearing.

AND BE IT FURTHER RESOLVED, that the President of the Conference communicate the views of the Conference to appropriate officials in the legislative and executive branches of the government and other interested persons.

Saturday, Aug. 25, 1984 Section C

BUSINESS

THE DENVER POST

Stanko plants may forfeit inspections

Denver Post Staff Wire Reports

'We're going to appeal that decision.'

Henry 'Butch' Stanko

Nebraska Beef Processors, which formerly operated the defunct Cattle King Packing Co. in Adams County, could lose its federal inspections under an order issued in Washington, D.C.

An administrative law judge ruled that federal meat inspection should be withdrawn from Cattle King Packing Co.; Stanko Packing Co. Inc., Gering, Neb.; and Nebraska Meat Packers, Gordon, Neb., the USDA said. All three companies did business under the "Nebraska Beef Processors" trade name, but the Gordon plant is the only one still in operation.

If the U.S. Department of Agriculture withdraws its inspection services, however, it effectively would shut down the plant. Meat that isn't federally inspected cannot be shipped across state lines.

The Cattle King plant, just north of Denver, was closed in February following allegations of serious slaughtering and beef handling deficiencies. In April, Monfort of Colorado Inc., owner of the packing facility site, donated it to the Western Stock Show Association, which said the plant would become the Monfort Research Center.

The Gering plant is under option to the Packerland Packing Co. of Green Bay, Wis., and is not operating. The prospective new owners will have to apply for federal inspection before they reopen, officials said.

Donald L. Houston, administrator of USDA's Food Safety and Inspection Service, said the plants have until Sept. 26 to file an appeal with the USDA judicial officer.

Former Cattle King manager Henry Stanko Jr. was sentenced Aug. 6 to one year in jail and fined $1,000 after pleading guilty to selling adulterated meat.

Rudolph "Butch" Stanko, a cousin and owner of Cattle King, is scheduled to go on trial Sept. 4 in U.S. District Court in Denver on similar charges.

John A. Campbell, the administrative law judge, issued his decision Monday. Inspection was dropped at Cattle King for two years, the Gering plant for 18 months and at the Gordon plant for two years.

Campbell upheld USDA's charges that Cattle King illegally processed adulterated meat, processed cattle that had died before they could be slaughtered and concealed those actions from USDA personnel.

"We're going to appeal that decision. The judge reluctantly withdrew inspection from Nebraska Beef of Gering. I quote him," Butch Stanko told The Denver Post Friday evening from his home in Gering.

"I think it was because he does work for the Department of Agriculture. He felt a lot of pressure. He was on the Department of Agriculture team. You always vote with your team, don't you?" Stanko said.

"It wasn't a bipartisan judge. He is an administrative judge for the Department of Agriculture."

*

Stanko blamed the inspection order's inclusion of the Gordon slaughter plant on the fact that Stanko owns a one-half interest in that plant with his father, Rudy Stanko Sr. "That's the only reason he gave," Butch Stanko said of Campbell's decision.

Stanko denied that he has any control over the Gordon operation. He said his interest in that plant is in a blind trust.

As in the past, Stanko defended the Nebraska company's management of the old Cattle King plant. "The Cattle King plant in Denver, which a year ago was employing 400 people and slaughtering around 3,500 head of cows a week for the ranchers of the state of Colorado, has never reopened. They can't even give the plant away."

File

DEPARTMENT OF HEALTH & HUMAN SERVICES Office of Hearings and Appeals

Refer to: LCL-85A-067

Memorandum

SG-T2

Date March 29, 1985

From L. Charles Leonard, RCALJ
OHA - Region II

Subject Requesting Medical Evidence Directly from the Source

To All ALJICs

We have repeatedly advised our field offices through correspondence and in our yearly Regional Team Visits that all medical evidence should be secured through the State Agency. For those offices that felt that they could receive medical evidence more expeditiously directly from the source, we cautioned staff to advise those sources that OHA was empowered to pay no more than $10.00 for a report. This is the fee that the State Agencies pay for medical reports and we cannot exceed that amount.

From time to time doctors have sent in bills for $25.00 to $100.00 for these reports and we were obliged to ask them to reduce their fee to the allowed $10.00 figure. Recently, an Administrative Law Judge in one of our field offices received a bill for no less than $367.60 as a result of a subpoena to a doctor for medical evidence. My understanding is that the medical office involved is only entitled to subpoena fees. But why get into a hassle with a medical provider. I advise you again to either go through the State Agency for the medical evidence you need or if you go directly to the source, you must advise them that you are allowed to pay only $10.00. Why have the Agency tell the ALJ to pay any sums above the $10.00?

In my own cases, if a claimant's doctor won't cooperate, I write the decision on what I do have. Very rarely do I ever use our illusory "subpoenas."

In connection with the use of subpoenas for medical evidence, I direct your attention to Section I-570ff of the Administrative Law Judge Handbook. Those sections are very specific about the use of subpoenas only in the most unusual circumstances.

Charlie Leonard

L. Charles Leonard
Regional Chief Administrative Law Judge
OHA - Region II

cc: All HOMs

Copy to each
ALJ, DW, HA
SHA.
4-1-85

UNITED STATES GOVERNMENT

memorandum

DATE: April 7, 1986

REPLY TO ATTN OF: Mark Grossman, Supervisory Attorney

SUBJECT: Use of Vocational Experts

TO: All Decision Writers

With the advent of reconfiguration in this office decision writers are advised to confer with the hearing assistants assigned to their units in order to clarify questions that might arise on the use of vocational experts. This is especially important in light of a number of court remands recently received in this office prompted by failure to take vocational expert testimony.

Please reiterate that vocational experts should be scheduled in the following instances:

1. Non-exertional impairments. This includes any emotional or intellectual condition, seizure disorders, hearing or vision problems, environmental restriction (fumes, dust, etc.) manipulative impairments or postural disorders (for further clarification see various rulings, 83-12 and 83-13 being especially useful).
2. When the above limitations are combined with an exertional impairment there is still a need for a vocational expert.
3. When a claimant has lost a limb.
4. Where only a vocational expert can evaluate the skill and exertional levels of past work.
5. Where a claimant's residual functional capacity falls between two exertional levels.
6. Where the issue of vocational adjustment and transferability of skills must be considered.

The above should be considered general in nature. Should hearing assistants have questions on specific cases they would be best advised to confer with the ALJ who is the final arbiter. However, by keeping the above categories in mind, the hearing assistants may well be able to schedule cases with vocational experts without imposing on the ALJ.

I will be available to discuss any questions that may arise.

Mark

MARK GROSSMAN
Supervisory Attorney

cc: All Administrative Law Judges

Jo [illegible] L.
RR 3
Kirksvil[illegible] Mo.
63501

RECEIVED
FEB 26 1985

United States Dept. of [illegible]
Office of the Hearing Clerk
Washington, D.C.
20250

February 19, 1985

Subject: In re JoEtta L. Anesi d/b/a Jo's Kennel, Respondent-
AWA Docket No. 267

Dear Clerk:

In replay to your letter dated February 15, 1985 copy of which is attached, I reply that I may be only an uneducated layman when it comes to the law, but that I do know that our government is divided into three seperate but equal divisions, that of the Congress which makes the laws, the Executive which enforces the laws, and the judicial courts, which decides the fairness or legality of these laws. This is the reason that I stand upon my constitutional right and insist that my case be heard by only a judicial law judge, and not one from the Department of Agriculture which is the same department which is bringing the case against me.

Please advise the administrative law judge wheih you refer to in your letter of the above date, of my decision, and reply if he is going to honor my constitutional right in regards to this issue.

I have recently been advised by my congressman that I have this constitutional right which can't be infringed upon.

Sincerely,

JoEtta L. Anesi

JoEtta L. Anesi

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510

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ALICE R. MILDER, CHIEF COUNSEL AND STAFF DIRECTOR

May 20, 1986

The Honorable Joyce R. Barlow
Administrative Law Judge
26 North Road
Livingston, N.J. 07039

Dear Judge Barlow:

Thank you for your valuable testimony before the Subcommittee on Administrative Practice and Procedure on May 13, 1986. I regret that I was unable to chair the hearing. After reviewing the record, I have a number of questions.

Your written response to the following additional questions by June 4, 1986 would be appreciated.

1. Do you believe that the transfer of the Social Security Administration (SSA) judges from HHS to an independent review commission (such as in OSHRC and FMSHRC) would help ensure their functional and decisional independence? If this alone is insufficient, please describe why.

2. Do you believe that it would be organizationally and administratively simpler to set up an independent commission of SSA judges? If not, why?

3. Please describe how SSA judges stationed throughout the U.S. could be of assistance (in terms of relieving backlogs) to a "Corps" which would be principally based in Washington?

4. I am concerned about the costs of potential duplication of case logs, within the Corps and within the agency. For example, after a SSA case is heard, doesn't it return to the agency for review (such as the Appeals Council)? Does this mean that a case has to be "tracked" by the agency while in the Corps system and also after it leaves the agency review stage? What are the cost implications for such a dual tracking system?

Your cooperation in providing responses to these questions will greatly assist the Subcommittee. Should you have any questions, please contact Sam Gerdano, counsel to the Subcommittee, at (202) 224-7703.

Sincerely,

Chuck Grassley
CHARLES E. GRASSLEY
Chairman
Subcommittee on Administrative
Practice and Procedure

CEG;drs

Senator **Heflin**. Thank you. Judge Morse.

Judge **Morse**. Thank you. It is a pleasure to be with you again, and you all have a fairly complete record on the legislation in its general terms, so I would like to address a more narrow aspect of it, primarily, the concern that absent legislation such as the corps bill, that we are not making the kind of headway that is necessary, in light of the peak and valley requirements of the agencies in the experience that we are having with the loan authority under the existing legislation.

Let me say first, however, in passing, if I may, that I was a bit startled by Mr. Cynkar's suggestion, in context of whether or not judges would be as responsive in a corps, that there is no authority on the part of administrative law judges today, to rule on legality of agency implementation of statutory mandates and statutory imperatives.

That is not my understanding. It has not been during the 13-plus years that I have served in an administrative law judge capacity. I have never hesitated in looking at the propriety in terms of legalisms with respect to the agency's implementing regulations of statutory authority.

One of the great strides—it will be remembered—that was accomplished by the Administrative Procedure Act, was the centralized merit selection system, but that act essentially was a compromise. It assigned to the Civil Service Commission the nondelegable role of examiner for the new hearing examiner competitive register, and left actual appointment to the employing agencies.

You will recall the history tells us, that on the Hill, there was serious consideration for having a centralized appointment authority, but in 1946, it was not yet accepted. That is 40 years ago.

The beauty of the act was, however, to recognize that, in order to attempt to meet peak and valley requirements, there would be a loan authorization to the Civil Service Commission to permit people—hearing examiners—to be assigned case by case, but to be selected by the Commission, not to be selected by the using agency in order to avoid judge shopping.

Well, the model that we had was one in which it was considered acceptable for the agencies to employ hearing examiners selected from the central register, and it was understood that once hired, these folks could only be removed for cause, after opportunity for a hearing, or, as appeared in subsequent judicial understandings of the act, for reductions in force where there was an impersonal selection out as the result of a reduction in functions, or budgetary requirements.

Now for the peak and valley problem, the solution was this loan program, which I have mentioned in highlighting the compromise. The concept of the loan program was to permit agencies, through the auspices of the Civil Service Commission to borrow, then hearing examiners, now judges. This theoretically sound model, the loan program, has provided, however, on analysis, an insufficient mechanism, adequately, to fulfil the emerging needs to balance the resource among the agencies.

The deficiency has been demonstrated over and over again by the inability on the part of OPM, promptly, to fill the demands made on it by borrowing agencies, and this is understandable.

In effect the agencies being asked, through OPM, to provide the resource, are asked for the allocation of a significant part of their personnel resource so far as administrative adjudication is involved.

The agencies which claim a need demonstrate their need to OPM, but it is not easy for OPM to obtain the resource. It is perfectly understandable that agencies are reluctant to commit their judges for what can develop into extended periods of time.

I might add that my own experience, not only at OPM while I administered the program—and I go into more detail about that in the prepared remarks—but since, highlight the concern that the borrowed judge, and the lending agency, necessarily has to keep his and its own priorities higher than that of the borrowing agencies, and so there is a tendency to let the borrowed cases slough off, and they take longer than they ought to. And the reason is that you have intervening priority demands on the part of the employing agency. Now, it has been my experience at OPM that aside from the deficiencies in the loan program, which I think are themselves a significant rationale for moving ahead with a corps, that there is indeed a problem of perception which goes beyond the Social Security Administration.

It has often been said that the decisional independence problem is parochial to, or peculiar to the Social Security Administration. I suggest that is not the case.

I can recall dialog with practitioners before the National Labor Relations Board informing me that they, as experienced and sophisticated labor lawyers, had no problem with appearing before the administrative law judges of the National Labor Relations Board; but that they had a great deal of difficulty persuading their clients, their employer-clients, that they were going to get a fair shake before NLRB judges.

This is not a frequently raised rationale but it is one which you hear from time to time and which I heard. I can recall that early in my days as an administrative law judge at the Civil Aeronautics Board, the then acting chief administrative law judge asked me to draft—as an amanuensis—to draft an order for the board, upon a review of an interlocutory order of mine, as a presiding judge, and which was being appealed by one of the parties, or several of the parties in a multiparty proceeding. I was rather outraged, appalled, and took exception. So far as I know, it was never asked of a judge again in that agency. But there is no doubt that the present situation, which I think is far from being seriously "infected" to the point of being unhealthy, but which has within it seeds of illness which can well be cured by a corps, is one which, on reflection, will be improved if we have the corps alternative.

I might add, that although I have not personally been improperly approached with respect to the merits of any case, either as a judge, or as a chief judge, that the very existence today of the multiagency situation in which chief administrative law judges, or single judges in single judge agencies—whatever the title might be—are, by definition, members of the policy and senior staff of the agencies, also gives rise to a situation which is not quite the judicial model that I think those of you who would seek to maximize the fairness, and the perception of fairness in administrative adjudication need and demand.

I suggest that some of the criticism from outside the administrative law judge corps, of the proposal, reflects an essential discomfort with the role of administrative adjudication in the executive branch.

And I would personally join in the suggestion by Mr. Cynkar for the Justice Department, that an article 1 court might provide a solution. I do not know that anyone here would disagree with that as an optimum result. But putting that aside, in terms of whether or not it is a practical alternative, it seems to me that the corps concept holds out a much better realization of the idealization that is reflected in the Administrative Procedure Act, and which, after all, was itself a major step forward 40 years ago. It is time for improvement on that model.

Let me just add, if I might, that while I was at OPM, under the authority of the present legislation, we attempted a minicorps. We had the coincidental advantage of a significantly diminished caseload at the Interstate Commerce Commission, and briefly, a very responsive leadership at the Office of Personnel Management, and with the assistance of some folks, we crafted an agreement whereby we borrowed from the ICC, and we used ICC funding, as well as personnel resources.

That floundered only because of budgetary constraints but it was far short of the kind of result that we could obtain under new legislation. Thank you.

[The statement follows:]

PREPARED STATEMENT OF MARVIN H. MORSE

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I appreciate the opportunity to present to you my views in favor of establishment of a corps of administrative law judges, centrally managed, such as envisioned by S. 673. I express support for the proposed enactment in addition to others who appear before you on behalf of the Federal Adminstrative Law Judges Conference, and also on behalf of the Federal Bar Association. The FBA, a nationwide, 65-year old association of attorneys, comprising today approximately 15,000 members, includes among its constitutional objectives, service "as the national representative of the federal legal profession," and "to promote the sound administration of justice."

I am pleased to advise that, consistent with those objectives, the national council of the FBA, its governing body, adopted in 1984 a resolution supporting the creation of a federal administrative law judges corps. FBA Resolution 84-3 provides as follows:

> WHEREAS, the public's perception of Federal Administrative Law Judges should be that of an independent judiciary not connected to any particular government agency;
>
> WHEREAS, the allocation of such judges should be to areas of the greatest need;
>
> WHEREAS, the creation of a Corps would permit substantial cost savings based upon a large scale case management system;
>
> RESOLVED, that the Federal Bar Association support the concept of a Federal Administrative Law Judge Corps as reflected for example, in the proposed S. 1275; HR 3539; HR 5156 (98th Congress).

In my role as chairperson of the Association's Career Service Section and as an advisory member to the leadership of its Judiciary Section, I enthusiastically commend to you the FBA's interest in enactment of legislation to establish a federal administrative law judge corps.

I do not lightly reach the conclusion that it is timely to achieve the objectives of S. 673. Indeed, my own experiences are unique, not because I have served as an administrative law judge in four agencies, Federal Power Commission, 1973-1975, Postal Rate Commission, 1975-1977, Civil Aeronautics Board, 1977-1980, and Small Business Administration, 1982-date, others have also served in more than one, or even two, agencies, but because I bring to the question the perceptions gained from experience as the Assistant Director for Administrative Law Judges, Office of Personnel Management, April 1980 - December 1982.

My views represent no government agency, they are only mine. But they reflect almost 34 years at the bar, almost 27 as a government lawyer. The administrative law judge experience, highlighted by almost three years at the head of the program on a day-to-day basis, compel the conclusion that efficiency, accountability, recruitment, retention and the perception of fairness will all be enhanced by creation of a central corps.

Efficiency and Accountability

One of the great strides accomplished by the Administrative Procedure Act was the centralized merit selection system but the compromise which assigned to the Civil Service Commission the non-delegable role of examiner for the new hearing examiner competitive register left actual appointments to the employing agencies. Of course, once hired a hearing examiner, now, administrative law judge, could be removed only for cause or, impersonally, in a reduction-in-force or abolition of functions.

As an annex to the compromise, Congress wisely anticipated that peaks and valleys would occur in the need for judges, agency to agency, and provided that agencies faced with need for judge services might borrow from other agenices with the consent both of the judge and of the employing agency (5 U.S.C. 3344). In order to preclude judge shopping in the guise of filling occasional or temporary needs, Congress required that only the Civil Service Commission, now OPM, might fill loans when a request for judge services is made by the borrowing agency; OPM makes the selection rather than the borrowing agency doing so.

The theoretically sound paradigm, the loan program, provides, on analysis, an insufficient mechanism adequately to fulfill the peak/valley resource allocation which Congress had in mind forty years ago when it enacted the Administrative Procedure Act. The deficiency has been demonstrated over and over again by OPM's inability promptly to fill the demands made on it by borrowing agencies from among those employing agencies willing to make their judges available. It is unmistakable that OPM as borrower must beg for assistance even though the loans are reimbursable. It begged for help when I managed the program; it was made clear that such is the case today as recently as April 8 of this year when my successor at OPM, with his staff, met with the chief administrative law judges, and stressed OPM's virtual inability to meet demands. It was emphasized that delay in borrowing a judge might lead to failure to meet decisional deadlines the result of which could abort the public policy objectives for which certain cases were initiated in the first place.

The loan program requires the best efforts of all multi-agency participants. It is only natural that emerging requirements for the judge to attend to his or her own agency dockets will intrude on loan arrangements previously made, frustrating the timetables envisioned when the prior commitment was made. Moreover, I am told, and believe from the experience of my management stint at OPM, that some agencies never, or almost never, agree to lend their judges, even when otherwise under-utilized, for fear of spotlighting that excess resource or of committing it beyond recall for the agency's own future, if unanticipated, needs. Furthermore, there are agencies which are notorious for their refusal to hire their own judges, but who are persistent borrowers. Frequently, cases settle once the parties are apprised that a judge has been appointed to preside, and case scheduling has begun.

Net borrowers are a strong argument for a centralized corps, one which could service their needs, perhaps assisted by structuring motion judge calendars, a solution to the problem of frequent settlements not available under the present system. Finally, in this respect, there are occasions such as one which involved the Federal Labor Relations Authority a few years ago, where OPM was asked by the Court of Appeals for the District of Columbia Circuit, to locate a judge to preside from outside the agency in a particular proceeding which inquires into conduct or practices of the agency under review.

Briefly, in 1980 - 1981, we experimented, under present authority, with a "mini-corps" program by which I obtained judges to be assigned temporarily to OPM for assignment out to agencies in short supply. Regrettably, the program failed because it depended on the funding of the supplying agency -- which evaporated -- and subseqently the unavailability of OPM funding and hiring authority.

The enactment of S. 673 is a logical step in the very direction Congress pointed in 1946 when it established the interagency loan program. The experience to date, however, informs us that, human nature and program needs being what they are, the loan program is an insufficient answer to calls for more efficient utilization of the judge resource. It is moreover in no way successful with respect to accountability for the simple reason that no one, the chief judge, agency administrators, even docket clerks, can fit the outside case into the lending agency case tracking and docket control systems. Additionally, as already noted, the "loan" cases tend to give way, quite understandably, to intervening assignments by the lending agency, and to fall further and further behind.

Recruitment and retention

At a time of unprecedented instability in personnel planning as the result of budgetary constraint, program abolition, and evolving priorities in alternative dispute resolution, recruitment and retention of capable and qualified personnel has become a major concern of senior public officials responsible for effective federal legal representation and counsel. This was a principal concern expressed at an April 2, 1986 luncheon meeting of agency general counsels (or their delegatees) who assembled in response to an invitation by the American Bar Association's Special Committee on Lawyers in Government of which I am a member.

The personal dimension is particularly significant at senior career levels such as have provided an important source of administrative law judges over the past generation and a half. To attract and retain the best qualified among the applicant pool, more than a marginally competitive salary is required. What is required is a reasonable basis on which the judge-candidate or incumbent can form the conclusion that a respectable self-fulfilling role is to be performed, free of the taint of association with any particular employing agency, and free of vicissitudes of reductions-in-force or reorganizations, agency by agency.

The present statute, 5 U.S.C 1305, calls on OPM to investigate problems in the administrative law judge program, and to require reports from agencies as part of its statutory supervisory responsibilities for the administrative law judge program. Operationally, these statutory provisions are seldom utilized. Quite obviously OPM, and the Civil Service Commission before it, had and has too many claims upon it in other respects to perform this task. As the result, the opportunity for others to complain of ALJ deficiency, or of ALJs to complain of managerial or other faults which impinge on them, is all but lost. The single-minded centralized program focus which a corps can provide in such areas of tension is obvious and, clearly, argues for creation of the corps.

Perception of Fairness

In addition to service as an administrative law judge in four agencies, I have presided also, on loan, in cases of another three. Never have I been aware of any claim of personal bias directed against me. (Once a commentator suggested that parties before me at the Postal Rate Commission might have been chilled upon recalling that I had appeared before that agency several years before on behalf of the Postal Service.) The problem is not that judges may have previously appeared before the agencies in which they later serve, but that the parties are apprehensive that an employing agency may unduly influence its employees and that in some instances there is too much inbreeding -- judges who formerly were employed by the same agency in attorney positions. I know because lawyers and administrative law judges have told me that clients and parties, respectively, have from time to time expressed dismay at the possibility of a fair trial before an agency employee or even a borrowed judge who presides at a trial on agency premises, under the agency seal. Taken together with the compelling rationale in favor of the corps previously discussed, it is difficult from the perspective of my experience to appreciate that there is any downside risk to the public interest by enactment of S. 673. To the contrary, as we have seen, all the reasons in favor suggest an idea whose time is now.

Thank you for the opportunity to present these views.

Honorable Charles E. Grassley,
Chairman
Subcommittee on Administrative Practice
and Procedure
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

June 10, 1986

Dear Senator Grassley:

Thank you for the opportunity provided by your May 20, 1986 letter to supplement my May 13 testimony before the subcommittee by responding to the following questions:

1. Q. As drafted, S. 673 contemplates seven divisions of the "Corps" of ALJ's. Would you favor a further subdivision of any of the named divisions, based on what you know to be current and projected agency caseloads?

A. I do not recommend a further statutory subdivision of the contemplated seven divisions although I would not recommend against such a step if there were prevailing sentiment in favor of additional jurisdictional break-outs. Since S. 673 contemplates assignment across division lines in any event, I am not among those who cavil at any particular division alignments. Instead, an effective means to tap and retain expertise of the judges -- particularly those who have served in a number of agencies and whose experiences, including pre-ALJ service, provide a degree of subject-matter expertise -- is to assign at least one judge to monitor regulatory, judicial and legislative developments pertaining to each agency which has historically called for judge services. In that way the corps could maintain current knowledge with respect to potential calls for ALJ services by virtually every agency. Of course, by definition, such monitoring would be unnecessary with respect to an agency which has a substantial or otherwise recurring hearing case load, the existence of which would provide the predicate for a sufficiently active cadre of judges as to overtake the need for maintaining a "watching brief."

In short, without my having a current and sophisticated sense of current and projected agency case loads sufficient to inform as to the need for divisions additional to those identified in the bill, it is my judgment that optimal resource allocation does not depend on establishing additional divisions; rather, what is needed is to broaden the scope of decisional experience and to improve the morale of the corps, as a predicate for recruitment, assignment and retention.

2. Q. With respect to the issue of decisional independence, what remedy would a "Corps" judge have under S. 673, should a Chief Judge or Division Chief discriminate or retaliate against the judge for "displeasing" adjudicatory activity?

A. One remedy, long term, would be for the aggrieved judge to submit a position in opposition to reappointment of a chief or division chief who discriminates or otherwise retaliates for "displeasing" adjudicatory activity. Another resort would be to rely on the prohibited personnel practices provisions of Title 5, United States Code since the conduct about which you inquire would appear to be in violation of the prohibitions against performance appraisal. In this respect, your question focuses attention on the absence from S. 673 of the explicit prohibition against performance appraisal contained in 5 U.S.C. § 5372. While it may not have been thought necessary to re-enact section 5372 in light of (a) the broad acknowledgment in S. 673, and in its legislative history, of decisional independence, and (b) the establishment of a single pay level for ALJs, your inquiry suggests the wisdom of amending the bill to explicitly recapture the prohibition contained in 5 U.S.C. § 5372.

Moreover, an aggrieved ALJ could invoke the provisions of the bill which call for peer evaluation with respect to allegations of incompetence, misconduct or neglect of duty. Presumably the chiefs, no less than the corps of judges, generally, are subject to the peer review mechanism of the bill.

3. Q. If Congress could make statutory changes in the ALJ loan program to ensure its effectiveness, would this obviate the essential need for a "Corps" of ALJ's? If not, why not?

A. My testimony at the hearing was intended to suggest that deficiencies inherent in the loan program warrant improvement by substituting the ALJ corps model. See, also, Scalia, The Hearing Examiner Loan Program, 1971 Duke L. J. 319,356-366 (1971). In my view, tinkering with the loan program without combining the judges under a single manager will not solve the need for peak and valley shaving. The "mini-corps" developed at the Office of Personnel Management under my stewardship of the ALJ program depended for its brief success on the ability of the single manager to aggregate the assigned "corps" resource as a predicate for filling the needs of the borrowing agencies. That experience, to me, is the paradigm for implementation, although on a vastly broader scale and on a more independent basis, of the program contemplated by S. 673. Only a centralized single manager model will provide the highest and best use of the ALJ resource.

Whatever success there might be in improving the loan program, by legislative action or otherwise, the need persists for establishment of an independent corps. There is a need for the fact of decisional independence from agency influence and for the perception of decisional independence by guaranteeing separation of functions beyond the limited parameters provided by the Administrative Procedure Act, 5 U.S.C. § 554(d). As the number and variety of areas for administrative adjudication have grown so has the need for a cadre of judges who must observe credibility and demeanor and issue decisions on an informed record in respect of a growing variety of civil penalty as well as benefits, compensation, labor relations, licensing and regulatory enforcement actions. An increasing number and variety of administrative adjudications constitute the final fact finding actions, subject to agency and judicial review on the law and interpretation of the facts but not to de novo fact-finding. Enhanced public confidence in these fact-findings, the perception and reality of neutrality on the part of the fact-finders is what the corps bill is all about, and why it is needed.

Sincerely,

Marvin H. Morse
Chairperson, Career Service
Section

Senator HEFLIN. All of your written statements will be made a part of the record. Judge Morse, how long have you been an administrative law judge? You have served in a number of different agencies.

Judge MORSE. September 1, 1973, and then 2½ years of that, I was on leave from the corps of judges to serve as the director of the Office of Administrative Law Judges at the Office of Personnel Management.

Senator HEFLIN. As I listened to you speak, I was sitting here thinking about what has developed from the original idea of "hearing examiners" or adjudication of disputes at the administrative agency level, and I think that what we have seen develop is almost the entire elimination of the de novo trials with the question of appeals to the judicial system, this entire evolution enter in, and I believe we have a great deal of opposition to an independent corps that reflects the original concept of the hearing examiner from years and years ago.

Perhaps they have not yet taken account of the evolution to the present circumstance. As I listened to Mr. Cynkar there, I was thinking that if I introduced a bill for all appeals to the judiciary from administrative agencies to be de novo, at the district court level, I could almost take his arguments and use them to argue for such a bill. And I believe that, really, we may have lost sight of what has developed; similar to common law it has been a development process. We have not yet realized that we have moved very definitely toward a judiciary that functions as a judiciary. We lose sight of that.

If you have any comments on that from a developmental or historical viewpoint, I would appreciate hearing them.

Judge MORSE. Well, exactly. My own personal reaction, if I may, is that before I went to the Office of Personnel Management, I had suggested in several writing episodes, that the administrative law community should address this very question.

I became more convinced, while I was in the role at that office, that we had evolved to a point where it was time to take a fresh look at the dimensions of the existing program.

My concern—of course I guess I am essentially conservative—has been not to denigrate the existing system beyond all reason—per adventure, we do not get a new system; we do not want to provide ammunition to people who are hostile to the existing one.

And so I think a bit of caution has been necessary. But there is no doubt that the evolution of administrative practice under the act, and its increasing acceptance by the Federal courts as a model, has, I think, led us to the point we are at today. I have some concern at the moment, that some of this credibility we may be losing; specifically, as I understand it—I have seen several decisions of U.S. district court judges, upon review of cases arising out of the Social Security system, where, for the first time, the courts are expressing some suspicion as to the ability of the administrative law judges in that system to come down with truly independent results, for precisely the same reasons that Judge Barlow has suggested infects the Social Security system, and I think probably some of those cases could be provided, if the Senator wishes.

Senator HEFLIN. Well, thank you. I appreciate your testimony. We appreciate it. I think we have a full record with your statements. Thank you.

We will now call on a panel consisting of Prof. Donna Price Cofer and Hon. Ronald I. Parker, acting director, and administrative law judge of the New Jersey State Office of Administrative Law. Professor Cofer is from the Department of Political Science at Southwest Missouri State University.

Professor Cofer, would you begin.

STATEMENTS OF A PANEL CONSISTING OF PROF. DONNA PRICE COFER, DEPARTMENT OF POLITICAL SCIENCE, SOUTHWEST MISSOURI STATE UNIVERSITY; AND HON. RONALD I. PARKER, ACTING DIRECTOR AND ADMINISTRATIVE LAW JUDGE, NEW JERSEY STATE OFFICE OF ADMINISTRATIVE LAW

Ms. COFER. As was indicated by Judge Palmer, I have been involved in researching the Social Security Administration hearing process now for about 7 years, and my research has told me that in the past 10 years, certainly, within the Office of Hearings and Appeals within Social Security, that the administrative law judges have been put under a tremendous level of pressure, principally in two ways.

They have experienced performance reviews of their work in terms of productivity and also, in terms of assessments of the actual accuracy of their decisions.

Within 10 years, expected levels of productivity have ranged from 20 to 45 cases per month, and the standards of accuracy have unpredictably varied, depending upon the definition of disability accepted at that time.

The Office of Hearings and Appeals has undergone three major changes in leadership over the past 10 years, and each regime has brought with it its own interpretation of quality and quantity, and its own sensitivities to the political environment. Of course, the most rigorous political interpretation in that time span came about with the disability amendments of 1980, and I think we are all familiar with Bellmon review, and what that meant to the administrative law judges within Social Security.

About the time that Bellmon review was getting underway, I conducted a survey of the ALJ population within Social Security, to see what their ideas of their role were all about, and, quite frankly, when I walked into this thing, I did not know what I was walking into. I really did not have any sense of the response that I would get from these people.

The survey went out to all 728, all of the law judges in Social Security, as listed in the agency directory in the fall of 1982. And I received a response rate of 68 percent from these people.

In fact, when it was all over, I had an office that was full of boxes and boxes, and file cabinets of materials that were sent to me, in addition to the return questionnaire instruments.

So obviously they had a lot to say. The compilation of the survey is found in my book that was published by Greenwood Press last summer entitled "Judges, Bureaucrats and the Question of Independence."

To summarize those results, and what are the critical questions, it seems to me for our purposes here—the judges were asked to indicate their level of agreement or disagreement for this statement: "Judicial and agency emphasis is being placed on limiting fiscal and administrative burdens at the expense of due process fairness to claimants." Sixty-four percent of the ALJ's agreed with that statement; 26 percent disagreed.

"Tacit agency pressure is placed upon SSA ALJ's to hand down fewer reversals during times of National Government, economic retrenchment."

Seventy percent of the law judges agreed with that statement. Twenty-three percent disagreed. And many of them on the questionnaire said, "It's really not that tacit."

"The quality of my decisions as an ALJ has been hurt by SSA pushes for more decisions per month." Sixty-nine percent of them agreed that the quality of their work had been harmed; 24 percent disagreed.

"Agency setting of case quotas and evaluations of ALJ performance is advisable." Eight percent agreed and 92 percent disagreed.

One of the most pungent statements that a law judge sent to me on the matter was as follows: "The ideal administrative law judges is one who attends the hearing, sizes up the claimant as sincere, or not, and then turns the file over to a decision-writer, who has been trained to apply management standards not all of which are consistent with law, logic, or medicine. That administrative law judge signs 35, or more, decisions each month. If the agency is permitted to establish quotas, all administrative law judges will be working like that, and those that are conscientious and competent will disappear."

Since the survey was completed, the productivity issue became so critical that OHA took four administrative law judges before the Merit Systems Protection Board, and the charges were for removal for low productivity.

None of those judges was removed from office, but the MSPB indicated that if they had found the statistical evidence of the agency more convincing, they would have considered the possibility, and I think it fair to say, that is not out of the question for future cases.

A second critical development, of course, was the Association of Administrative Law Judges filing suit against the agency itself in 1983, and as a result of that suit, the law judges received a certain amount of relief, I suppose, in terms of a judgment that basically found that the pressures had been real, and that there was every reason to believe that that had affected the decisions that they made.

But unfortunately, the judge ruled in favor of the defendant agency, arguing that the previous preoccupation with accuracy and productivity was no longer evident since the agency had discontinued review of selected judges, and now, was conducting only a random review, which of course goes on to this day. One would hope that with the moratorium on cessation reviews in April of 1984, that the law judges and the agency would find some peace together, but they have not.

It is impossible for the law judges to forget that they were placed in a position of reviewing unfounded State cessation reviews, and by reversing those denials, placed themselves under the ax of Bellmon.

A politically sensitive bureaucracy cannot house adjudicators who have pledged themselves to impartial and independent decisions, and one of the "hottest" issues right now, of concern to the law judges, is the issue of the reorganization of the hearing officers all over the country.

In the spring, I was asked by the ALJ Association to conduct a second survey of the law judges to get their impressions and feelings concerning that reorganization, and I have brought with me the results of that survey, which I only computed last week.

If you would be interested in seeing those, I would be happy to submit them.

Senator **Heflin**. Well, if you submit it for the record, it will, without objection, be entered in the record.

[The survey follows:]

ADJUSTED FREQUENCIES
424 CASES (both mail

SURVEY QUESTIONNAIRE

Completion Time: 10 minutes

The purpose of this survey is to investigate the attitudes of Social Security Administration ALJs concerning hearing office reorganization, or "team functioning." The results will be analyzed in the aggregate, as the primary concern of this study is the group, not individual, response. Please do not identify yourself in answering the questionnaire.

Throughout the survey, the term UNIT HEARING OFFICE is used to mean an OHA hearing office in which each ALJ supervises and evaluates the work of a support staff consisting of a staff attorney, hearing clerk and hearing assistant, all of whom are exclusively assigned to the ALJ for the purposes of case development and decision writing. The term POOLED HEARING OFFICE is used to mean an OHA hearing office in which no more than one support staff member is assigned primarily but not exclusively to a single ALJ and in which support staff are not evaluated by the ALJs. PRODUCTIVITY is used to mean the number of case dispositions made in a hearing office each month.

If you wish to comment on particular questions, please do so on a blank sheet of paper, identifying clearly the question you are addressing. Thank you.

CHECK ONLY ONE RESPONSE
TO EACH QUESTION.

1. Removing the ALJ from case development would increase the efficiency of processing claims. 13.3 AGREE 82.1 DISAGREE 4.5 UNDECIDED

2. Each ALJ should be assigned a support staff unit which always works on that ALJ's caseload. 85.5 AGREE 11.9 DISAGREE 2.6 UNDECIDED

3. Pooled hearing offices have a higher level of productivity than unit hearing offices. 11.6 AGREE 71.0 DISAGREE 17.4 UNDECIDED

4. The ALJ should be the immediate supervisor who evaluates the support staff who work on his/her cases. 82.0 AGREE 13.0 DISAGREE 5.0 UNDECIDED

5. Insufficient case development is more likely in a unit hearing office than a pooled hearing office. 8.1 AGREE 86.2 DISAGREE 5.7 UNDECIDED

6. Removing the ALJ from case development would enhance the prestige of the ALJ in the determination process. 12.7 AGREE 79.3 DISAGREE 7.9 UNDECIDED

7. The projected increased caseload due to CDRs has heightened OHA interest in hearing office productivity. 64.8 AGREE 12.6 DISAGREE 22.6 UNDECIDED

8. Productivity evaluations of staff attorneys enhance the quality of their decision writing. 12.1 AGREE 79.0 DISAGREE 8.8 UNDECIDED

9. In a pooled hearing office, claims that could have been allowed on-the-record are more likely to be scheduled for hearing than in a unit hearing office. 63.0 AGREE 24.1 DISAGREE 12.9 UNDECIDED

10. Placing productivity goals upon support staff imposes pressure upon ALJs to increase their own productivity. 79.7 AGREE 15.8 DISAGREE 4.5 UNDECIDED

11. It is necessary for OHA to establish deadlines for case processing in order to guarantee timely dispositions by ALJs. 14.8 AGREE 78.8 DISAGREE 6.4 UNDECIDED

12. Before the pooling of the support staff of a hearing office is required by OHA management, a majority of the ALJs in the office should agree to the reorganization. 82.9 AGREE 11.7 DISAGREE 5.5 UNDECIDED

	CHECK ONLY ONE RESPONSE TO EACH QUESTION.
13. Support staff should be given cash bonuses for high production.	19.9 AGREE 67.8 DISAGREE 12.3 UNDECIDED
14. The pooling of support staff has increased the number of superfluous management personnel in the hearing offices.	78.4 AGREE 13.3 DISAGREE 8.3 UNDECIDED
15. The quality of the work of decision writers is better under the unit hearing office than the pooled hearing office.	72.2 AGREE 15.3 DISAGREE 12.5 UNDECIDED
16. The monetary costs of producing dispositions are higher in a pooled hearing office than a unit hearing office.	54.0 AGREE 11.6 DISAGREE 34.5 UNDECIDED
17. Pooled hearing offices produce decisions with a higher error rate than unit hearing offices.	64.2 AGREE 14.2 DISAGREE 21.6 UNDECIDED
18. Without ALJ evaluation of support staff job performance, the quality of support staff work declines.	77.4 AGREE 12.9 DISAGREE 9.7 UNDECIDED
19. OHA management is responsive to ALJ opinions on hearing office reorganization.	3.1 AGREE 90.3 DISAGREE 6.6 UNDECIDED
20. ALJs who refuse to cooperate with the work procedures of a pooled hearing office may be charged with insubordination by OHA.	63.0 AGREE 21.2 DISAGREE 15.8 UNDECIDED
21. The quality of ALJ decisions is enhanced by the pooling of the hearing office support staff.	4.0 AGREE 91.2 DISAGREE 4.8 UNDECIDED
22. Pooling of support staff adversely affects the morale of the hearing office.	76.0 AGREE 11.0 DISAGREE 13.1 UNDECIDED
23. Each ALJ should have the unsanctioned option of writing decisions without any assistance from support staff decision writers.	86.0 AGREE 8.2 DISAGREE 5.8 UNDECIDED
24. What is the organization of the hearing office to which you are currently assigned?	10.0 UNIT 90.0 POOLED
25. Which organization of hearing offices do you support?	86.5 UNIT 13.5 POOLED
26. Are you presently a member of the Association of ALJs, Inc.?	61.4 YES 38.6 NO

n = 259   n = 163

Ms. Cofer. All right. Thank you. I might just say, succinctly, that the survey results on the most central question were these: 86.5 percent of the law judges oppose the pooling of support staff in the hearing offices; only 13 percent of them favor it.

And OHA management has been saying for 2 years now that we have the majority of law judges on our side, and I think it is rather clear that they do not.

The last point I would like to make is that I think one of the strongest points for the corps bill is the idea that the law judges can undergo performance evaluations under a corps, and not be concerned for the compromising of their integrity.

I really feel that in this study I have seen people put in the position of being asked, "How much do you want to feed your family next month? Then you'd better not be issuing more than 50 percent allowances." It is just that clear.

And I think that the law judges cannot look at performance evaluation objectively until they are put in a nonpolitical environment.

No one is calling for a lack of accountability here. That is not what is going on. But I do not think that you can let those who evaluate the judges be so politically motivated, as, indeed, they must currently be; they must report back the numbers. So it is simply and totally an incongruous situation. Thank you.

[The statement follows:]

PREPARED STATEMENT OF DONNA P. COFER

The issue of fairness in administrative adjudication has existed since the inception of the Federal bureaucracy itself. Central to the passage of the Administrative Procedure Act[1] in 1946 was Congressional concern that the American public viewed agency adjudicators as both prosecutors and decision-makers. The APA was designed to protect the independence and impartiality of Federal hearing examiners by placing their salary, promotion, and tenure under the then-Civil Service Commission. Agency hearing examiners (known as administrative law judges--ALJs--since 1972) are not subject to a probationary period before permanent appointment and are exempt from performance evaluations by their agencies. ALJs receive periodic step increases in pay without certification from their agencies and can be removed only for cause as established by the Office of Personnel Management, not their employing agency. Under the APA, administrative law judges are to be given no tasks inconsistent with their role as ALJs and are to be assigned cases in rotation. The ALJ's decision constitutes that of the Secretary unless reviewed within a specified time. Finally, ALJs are never to be subject to the supervision or direction of anyone involved in the investigative or prosecutorial functions for the agency.

The Federal judiciary has supported Congressional intent to protect the independence of administrative adjudicators. In 1947, the U.S. Supreme Court compared the role of administrative hearing examiners to that of Article III judges.[2] Three years later, the Court ruled that Congress had two main purposes in passing the APA: (1) uniformity of procedure and standardization of practice among diverse agencies, and (2) separation of the functions of prosecutor and judge.[3] Justice Jackson, in writing for the Court, emphasized that indispensable to a fair hearing is the examiner "whose independence and tenure are so guarded by the Act as to give the assurance of neutrality, which Congress thought would guarantee the impartiality of the administrative process."[4]

Later cases have required that the hearing examiner's findings and conclusions be given weight independent of higher agency evaluation,[5] that the Civil Service Commission prevent any agency from compromising the integrity or impartiality of an examiner or from placing him under political influences or controls,[6] that demeanor evidence of hearing witnesses be given substantial weight,[7] and that Federal agency adjudicators be afforded absolute immunity from damage liability for their judicial acts.[8] In this last case, the Court noted that

> . . . the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency.[9]

The Court concluded that the independence of the ALJ is more critical than the risk that an unconstitutional act has been committed by an ALJ. Persons complaining of error can seek review by the agency or the courts. Even more recently, the Court of Appeals for the Second Circuit granted standing to a Social Security Administration ALJ as he challenged various performance reviews placed upon him by the Agency as an invasion of his decisional independence.[10]

OHA BACKGROUND

For the past ten years, Social Security Administration ALJs have found themselves subject to two principal kinds of administrative performance reviews--those designed to judge their level of productivity in terms of number of dispositions decided per month and those assessing the accuracy of their decisions. Expected levels of productivity have ranged from twenty to forty-five cases per month, and standards of accuracy have unpredictably varied depending upon the definition of disability accepted at the time. The Office of Hearings and Appeals (OHA) within the Social Security Administration has undergone three major changes in leadership, each with its own interpretation of the quantity-quality dichotomy for case disposition and each sensitive to its own political environment.

The most rigorous implementation of a political interpretation of disability determiniation began in March 1981 with the imposition of the Disability Amendments of 1980.[11] Congressional concerns over a burgeoning disability caseload prompted this three-pronged review process. Hereby, Congress created a pre-effectuation review of state allowances as well as a "cessation" review process through which all recipients of benefits would be subject to eligibility review by the states at least once every three years. As a result of "cessation" reviews, from March 1981 through March 1984, 1.2 million recipients were reviewed with 491,000 being initially removed from the rolls and 214,000 of those reinstated after appeal.[12] ALJs restored benefits to 60 percent of those rejected by the states as they reviewed case after case in which little or no medical improvement could be demonstrated since the claimant was judged disabled.

The third aspect of the 1980 Amendments was the Bellmon Amendment[13] which required a pre-effectuation review of ALJ allowances over state denials. Herein, Congress hoped to decrease the high ALJ allowance rate which, by earlier studies, could be linked with a higher error rate. Also of concern was the wide variance of allowance rates among individual ALJs. Bellmon Review was implemented in October 1981, with the initial group of sixty-five ALJs affected receiving notification from the Agency that they had been placed under such review indefinitely. Interestingly, the Agency in its zeal to eradicate erroneous allowances ignored several factors which could explain variance in ALJ allowance rates. These include (1) lack of state record development, (2) the introduction of new evidence into the record after state determination, (3) differences between the state guidelines and the SSA statute and regulations used by the ALJs, (4) the use of vocational rules by ALJs, and (5) the increase in ALJ caseloads.

Also, it is naive to assume that the "accuracy" of a disability determination is a simple assessment. The determination of the correctness of a decision, weighing complex and often multiple medical conditions against administrative regulations, can require a high degree of human judgment, the very reason for which judges are chosen. If state disability determinations were made by better-trained and less-harried technicians who could develop the case record more fully and interview the claimant face-to-face, the majority of cases appealed to the ALJs would rest close to the statutory definition of disability and would require the decision of a judge protected from political incursions.

ALJ SURVEY

Within this tense environment, I mailed a survey in Fall 1982 to the 728 SSA ALJs listed in the Agency directory. No previous study of the Office of Hearings and Appeals had contacted all of the SSA ALJs, guaranteeing them anonymity, and gathering a comprehensive data bank of their opinions about the various aspects of their role. The survey instrument measured ALJ attitudes under six categories: (1) the formality and/or adversarial nature of hearings; (2) claimant's due process rights; (3) evidence; (4) the hearing record; (5) ALJ independence, productivity, and terms of service; and (6) reforms. Also, no previous study had been conducted by an "outsider" with no vested interest in the survey's results.

In order to receive the best possible response rate, I sought an endorsement that would add credence to the survey. Louis B. Hays, former Associate Commissioner of OHA, informed me in a letter stamped September 22, 1981, that he could not "encourage participation requiring the time and attention of ALJs for a project not directly related to the burden of the current caseload of unprecedented proportions." In a letter dated November 6, 1981, Congressman Richard Gephardt of the House Ways and Means Committee wrote that he believed studies in the past had been an adequate indication of ALJ opinions. Still seeking a solid endorsement, I next turned to the Association of Administrative Law Judges, Inc., and its then-Vice President, Charles Bono. In contrast to the others, Judge Bono was elated that a truly dispassionate observer wished to study objectively the workings of the OHA, and particularly the ALJ role in the hearing process.

In early 1982, I received the endorsement of the Board of Directors of the Association of ALJs, Inc. As a result, the questionnaire was mailed with an accompanying cover letter signed by Judge Bono (who had since been elected president of the Association). The letter encouraged the ALJs to participate in the survey, noting that the ALJs were being given "an opportunity to voice [their] views on some pertinent issues of [their] profession" in a totally independent study.

In Fall 1982, the survey instrument was mailed and enjoyed a 68 percent response rate, much higher than expected. The results showed that a diversity of opinion exists in this population, although certain dominant opinions were demonstrated. A complete report of the ALJ responses

can be found in my book, JUDGES, BUREAUCRATS, AND THE QUESTION OF INDEPENDENCE: A Study of the Social Security Administration Hearing Process (Westport, CT: Greenwood Press, 1985). A summary of the questions and responses most critical to the issue of ALJ decisional independence is as follows:

(1) Judicial and Agency emphasis is being placed on limiting fiscal and administrative burdens at the expense of due process fairness to claimants.

Agree--64% Disagree--26%

(2) Tacit agency pressure is placed upon SSA ALJs to hand down fewer "reversals" during times of national government economic retrenchment.

Agree--70% Disagree--23%

(3) The quality of my decisions as an ALJ has been hurt by SSA pushes for more decisions per month.

Agree--69% Disagree--24%

(4) Agency setting of case quotas and evaluations of ALJ performance is advisable.

Agree-- 8% Disagree--92%

If AGREE, it is because: (check the ONE most significant reason)

12% The case backlog in some areas could be eliminated.

23% The ALJs would work at a similar level of production.

35% Each ALJ would be advised of points of efficiency improvement.

29% Other reasons (please specify)

If DISAGREE, it is because (check the ONE most significant reason)

27% Each individual case requires a different amount of time for the hearing itself and decision preparation.

4% The agency would set reasonable case quotas.

58% Quotas and performance evaluations would diminish ALJ independence from agency controls.

10% Other reasons (please specify)

Pungent comments accompanying responses in this section included:

> At one time the Administration distributed such information [reversal rates] to the judges monthly, and I felt some internal pressure to achieve a reversal rate at least no higher than the national average. To eliminate this pressure, I refuse to keep

> statistics or otherwise acquire knowledge of my reversal rate. [reversal of State denial = allowance]
>
> and
>
> . . . the ideal administrative law judge is one who attends the hearing, sizes up the claimant as "sincere" or not, and then turns the file over to a "decision writer" who has been trained to apply management standards, not all of which are consistent with law, logic or medicine. That administrative law judge signs 35 or more decisions each month. . . . If the Agency is permitted to establish quotas, all administrative law judges will be "working" like that, and those who are conscientious and competent will disappear.

The survey results have enjoyed not only publication but several practical applications. These are as follows:

(1) June 1983: Survey results were used by the U.S. Senate Subcommittee on Oversight of Government Management as it conducted hearings into ALJ decisional independence from production quotas and allowance rates.

(2) Fall 1983: Survey results were used in a hearing before the Merit Systems Protection Board concerning the removal of an SSA ALJ for "good cause," meaning low productivity.

(3) March 1984: I testified in the Federal District Court in Washington, D.C., in Association of ALJs v. Margaret Heckler, et al. regarding political pressures perceived by the ALJ population in the survey.

(4) August 1985: In Stieberger et al. v. Heckler, U.S. District Court, Southern District of New York, Judge Leonard Sand discussed the pertinent survey results in his decision and used them as a part of his reasoning for ruling on behalf of the plaintiffs.

(5) September 1985: I testified in Nash v. Califano in U.S. District Court, Buffalo, NY, entering into evidence the survey results on behalf of the ALJs.

RECENT DEVELOPMENTS

Since the survey was completed, the productivity issue became so critical that the OHA brought four ALJs before the Merit Systems Protection Board (MSPB) for removal because of low productivity.[14] The MSPB found the statistical evidence produced by the Agency unconvincing and ruled that a more defensive standard of productivity for determinations of such varying difficulty needed to be made. While ruling against the Agency on the low productivity charges, the MSPB certainly did not reject the notion of future Agency review if more substantial statistical analysis was achieved.

A second critical development was the Association of Administrative Law Judges, Inc., representing nearly 500 of the 800 ALJs in SSA, filing suit against the Agency in 1983. The Association alleged that the Agency's policies regarding increased productivity and review of ALJ allowances violated the Administrative Procedure Act, the Social Security Act, and due process of the Fifth Amendment as well as the 1979 Bono settlement.[15] The Federal district court judge limited the allegations to that of Agency review of ALJ allowances since the productivity issue was then still pending before the MSPB. The trial arguments centered on ALJs being forced to reduce the number of disability claims they allowed for fear of the Bellmon Review.

In September 1984, the ALJ Association received its judgment.[16] The judge viewed the Agency as having "retained an unjustifiable preoccupation with allowance rates, to the extent that ALJs could reasonably feel pressure to issue fewer allowance decisions in the name of accuracy." She further stated that the Agency's "insensitivity to that degree of decisional independence the APA affords to administrative law judges . . . could have tended to corrupt the ability of the administrative law judges to exercise that independence in the vital cases that they decide."[17] However, the judge ruled in favor of the defendant Agency, arguing that the previous preoccupation was no longer evident since the Agency had discontinued review of selected judges and was now reviewing a random sample of all ALJ allowances. The judge left open the legality of adverse Agency actions against ALJs rendering "inaccurate" decisions to the Merit Systems Protection Board, refusing herself to assess the legality or even feasibility of such reviews.

With the April 13, 1984, moratorium on cessation reviews and the consequent October 1984 Social Security Disability Benefits Reform Act,[18] one might hope that the Social Security Administration and the ALJs could find some peace together, but this has not been the reality. It is impossible for the ALJs to forget that they were placed in a position of reviewing unfounded State cessation reviews and, by reversing those denials, placed themselves under the ax of Bellmon Review. A politically-sensitive bureaucracy cannot house adjudicators who have pledged themselves to impartial and independent decisions. Under the current OHA regime, the ALJs continue to be pressured for higher productivity and, of course, are subject to Appeals Council own-motion review. OHA management is also reorganizing the hearing offices throughout the country so that support staff are no longer assigned to individual ALJs but rather "pooled." These support staff are placed under production quotas which, of course, indirectly affect ALJ performance regarding time devoted to full case development and quality of decisions rendered.

An impartial and non-harried decision maker is central to the protection of a claimant's rights to a fair hearing as guaranteed in the Administrative Procedure Act. While every reasonable person appreciates concerns for timely justice, a speedy and unjust decision is not an acceptable alternative. Random samples of all ALJ allowances are still reviewed for accuracy. If ALJs are carefully chosen and trained, and if state determinations were upgraded, ALJs would be considering only claims which lie very close to the statutory definition and require the judgment of a judge.

Agency concerns regarding productivity are heightened once again as projections of a 22 percent ALJ caseload are being made as cessation reviews are reheard.[19] The Agency has lost some credibility on the productivity issue in the past ten years for several reasons:

(1) The expectations for ALJ monthly production obviously depend upon the political mood of the moment. How would one establish even a minimum quota that would meet Agency needs for more than two years?

(2) In a conversation with the Chief ALJ in Washington, D.C., early last summer, I learned that about 2 percent of the ALJs are considered low producers. Given that there are

about 750 ALJs, 2 percent constitutes all of fifteen ALJs. Is this a significant enough drain on overall productivity to compromise the independence of all ALJs with a production quota? I am sure that academe absorbs a much higher percentage of low producers protected by tenure.

(3) Does low productivity equal inefficiency and does inefficiency equal "good cause" for removal of an ALJ? It is unfortunate that Judge Green in the ALJ Association case restrained herself from putting some boundaries around the concept of "good cause." Certainly one must ask how determinations varying in difficulty, and which are not fungible, can be lumped together to formulate production quotas.

(4) Although, like any political scientist these days, I enjoy my empirical research, I am always cognizant that when empirical methodology is assumed to be the only means of judgment, those factors which are not susceptible to such treatment are set aside as unimportant or irrelevant or are merely ignored. In applying numbers to the terms and conditions of anyone's employment performance, there is a danger of overlooking significant non-quantifiable data.

Production quotas are, therefore, a highly questionable means to ferret out ALJs who may be hiding their extremely low productivity behind the APA. In lieu of quotas, conduct-related criteria of ALJs who may be associated with low productivity can be used.[20] Has an ALJ consistently refused to schedule hearings and hold timely hearings? Do the ALJ's work habits prohibit timely acquisition of medical reports and staff attorneys' supporting legal research? Has the ALJ consistently held substantial numbers of cases without decision unreasonably long periods of time? Is the ALJ absent from work regularly? Does the ALJ leave the office every day at two o'clock? With such criteria and without any numerical boundaries, those very few indolent ALJs can be identified without threatening the judgment of a production quota upon all ALJs. Often, poor work habits to the point of negligence of duty will characterize an extremely low producer.

If such evidence can be accumulated, there is reason to challenge the ALJ's employment--but only then. Further, such judgments cannot be made within a political environment. In order to guarantee ALJ decisional independence and accountability, the ALJs should be moved to a non-political structure, such as the proposed ALJ corps.

CONCLUSION

In the 1982 survey, 83 percent of the ALJs favored the corps concept and only 16 percent opposed it. The most common reason for support (77 percent) was the independence such a corps would afford. The most common reason for opposition hinged on the possible "watering down" of expertise if called upon regularly to serve more than one agency. If housed outside a politically-responsive bureaucracy, ALJs could be evaluated on conduct-related criteria without compromising their adjudicatory independence. Of course, such independence will only have substance if ALJ decisions regarding benefit claims are no longer subject to Agency review and may be challenged only before an Article III court. If administrative reviews of ALJs' productivity and allowance rates can be used as disciplinary levers to modify ALJ behavior, a most basic tenet of due process, namely, an impartial decision-maker, will have been eliminated, and the entire disability determination process will continue to be compromised.

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May 6, 1986

NOTES

1. 5 U.S.C. §551 et seq. (1946).
2. NLRB v. Donnelly Garment Company, 330 U.S. 219 (1947).
3. Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).
4. Id. at 52.
5. Universal Camera Corporation v. NLRB, 340 U.S. 74 (1951).
6. Ramspeck v. Federal Trial Examiners' Conference, 345 U.S. 128 (1953).
7. NLRB v. James Thompson and Company, Inc., 208 F. 2d 743 (D.C. Cir., 1953).
8. Butz v. Economou, 438 U.S. 478 (1978).
9. Id. at 513.
10. Nash v. Califano, 613 F. 2d 10 (1980).
11. Pub. L. No. 96-265, 94 Stat. 441 (1980).
12. "U.S. Magistrate Rejects Reagan Policy on Benefits," New York Times, 12 May 1985, at 23, col. 1.
13. Section 304[g]. H.R. 3236, 96th Cong., 2d Sess., 126 CONG. REC. Part 2, 1407 (1980).
14. SSA v. Robert W. Goodman, MSPB No. HQ75218210015; SSA v. Jerry G. Brennan, MSPB No. HQ75218210010; SSA v. Stanley M. Balaban, MSPB No. HQ75218210014; SSA v. Irving Shore, MSPB No. HQ75218210013.
15. Bono, et al. v. United States of America Social Security Administration, et al., No. 77-0819-CV-W-4 (W.D. Mo., 1979).
16. Association of Administrative Law Judges, Inc., v. Margaret M. Heckler, et al., 594 F. Supp. 1132 (D.D.C. 1984).
17. Id. at 1142, 1143.
18. Pub. L. No. 98-460, 98 Stat. 1794 (1984).
19. SOCIAL SECURITY FORUM, Vol. 7, No. 5, May 1985, at 1.
20. Rosenblum, "Contexts and Contents of 'For Good Cause' as Criterion for Removal of Administrative Law Judges: Legal and Policy Factors," 6 W.N. ENG. L. REV. 593 (1984).

Senator HEFLIN. Judge Parker.

OPENING STATEMENT OF ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Mr. Chairman, I wonder if I might jump in here.

Senator HEFLIN. Yes, sir; certainly.

Senator SPECTER. I regret that I could not be here earlier, and that I cannot stay, but I just want to commend you, Senator Heflin, for introducing this bill on the issue of independent administrative law judges, and it is a principal and an issue that I believe in very deeply.

We had very extensive hearings in this room in 1984 on a case that involved Michael O'Rourke, who had a hearing before an administrative law judge, Judge Hupp, and Judge Hupp was followed, after an anonymous tip was received from the Immigration and Naturalization Board, about an allegation that he left work early. Judge Hupp was followed from Philadelphia for more than 100 miles into Maryland. He feared that the persons following him were from the IRA, Irish Republican Army—not the investment matters.

He stepped out of the case and a new administrative law judge stepped in, and found for Immigration and Naturalization Service. That is a 90-second description of a very complex matter.

Like Senator Heflin, Chief Justice Heflin, I have had some substantial experience—well, not quite like it—but a fair amount of experience in the judicial field, and I believe the proposed changes are necessary for independence for the administrative law judges, and I will be joining the battle. I just wanted to make that brief comment. Thank you, Senator Heflin.

Senator HEFLIN. Well, thank you, Senator Specter, we appreciate that. We have had a good hearing so far and would be glad for you to ask Professor Cofer anything now; or do you want to wait?

Senator SPECTER. Senator Heflin, I will review the transcript. I regret that I cannot stay. As I know you understand, our schedules are next to impossible here, but I did want to stop by and express my support.

Senator HEFLIN. Thank you. I appreciate your coming by and I appreciate your cosponsorship of the bill.

Senator SPECTER. Thank you.

Senator HEFLIN. Judge Parker, would you relate to us your experience in New Jersey.

Judge PARKER. Yes. Thank you very much, Senator. It is a pleasure to be here, and I would just like my presubmitted testimony to be entered into the record.

Senator HEFLIN. Without objection, it will be.

Judge PARKER. OK. And I also presubmitted what is known as the State of New Jersey Governor's Committee on the Office of Administrative Law, a 1984 report, and also enter that into the record.

Senator HEFLIN. Without objection, it will be admitted.

Judge PARKER. Thank you very much. Sitting here today, it is similar to sitting in the State of New Jersey, approximately 10 to 12 years ago, hearing the same arguments for and against the creation of a central corps of administrative law judges.

There does not seem to be anything that has changed. I do not come here as an expert. I come here perhaps to relate some of the experiences which we have gone through in the State of New Jersey during these past 7-some-odd years that we have been in existence.

Needless to say, when the subject of a central corps of administrative law judges originally arose in the State of New Jersey some 12 years ago, there was almost unanimity among agency heads, and cabinet officers that there was absolutely no need for it, they were doing a fine job with the hearing officer system, and that it was pointless to go beyond that.

Then Governor Byrne, who had been a cabinet officer, was very sympathetic to the creation of a corps of administrative law judges, and with the sympathy of the legislature then in session, on July 1 or July 6, 1978, a central corps of administrative law judges was established, in the words of the legislature, a "full-time corps of trained"—and I think that is important—"skilled administrative law judges to expedite the process by which administrative agencies decide contested cases, and to inject"—and perhaps the most important item in this whole thing—"greater impartiality into the process."

Because I think that is what all of us who are with government and work for government are looking for, and that is not only impartiality, but also the appearance of impartiality.

Some 4½ years after the office of administrative law was created, a new Governor took a look and appointed a committee to see how well this central corps of administrative law judges worked.

This new committee was composed of new cabinet officers, members of the private bar, Governor's council, members of organized labor, as well as an administrative law judge. And perhaps after 10 full days of testimony from cabinet officers, from all people who had had experience within the administrative process, they rendered a report—and I would just like to read the opening paragraph of what is referred to on page 8 of that report, of "Conclusions and Recommendations."

It says:

> The Committee's investigation led to a conclusion that the OAL was an efficient, well-run organization, which represented a significant improvement over the former hearing system in terms of quality and productivity.

So here we have a group who have no ties with the old administration, no ties with the old legislature, reporting to a new Governor on a bipartisan basis—and I should mention that both the old Governor and the new Governor were from two different parties—supporting a system which was created previously.

What has been the legislative reaction? The legislative reaction during the last 7 years has been to include new areas to come to the office of administrative law; areas as vital as right-to-know laws for employees; hazardous waste siting; hearings in State prisons regarding alleged charges against prisoners.

Surcharges in motor vehicle cases, and initial plenary decisions in fatal automobile accidents, for administrative law judges to revoke licenses within 15 days of the accident.

I can go on, but it is indicative of the fact that the legislature continues to support the corps of administrative law judges along with the administration.

What has the administration done? It has authorized, as a result of the committee's report, the creation of a corps of six senior judges within OAL, and this is in response to a certain effect to those people who attack the, quote, "the ex-agency expertise." With this senior judge corps, we now have a group of dedicated judges who assist in training, and developing, and maintaining agency expertise among the administrative law judges who exist right now. Another question which constantly raises its head: Are we creating another level of bureaucracy that is going to cost the taxpayers more money?

We have seen, in the State of New Jersey, roughly a 100-percent increase in the State budget in the last 4 years—7 years, rather—since the creation of the OAL. At the same time, the number of cases have doubled within the office of administrative law, compared to the prior hearing officer system.

What has been the cost effect? What normally should have been 200 percent ended up at approximately 25 percent. We have reduced the number of hearing officers from over 130 to down to approximately 40 ALJ's.

This is possible, for, as Henry Ford taught us, you use mass production, excellent management, and development of esprit de corps within a group to get the product done and delivered.

We are here for the citizens of our State. I am not here for the citizens of the United States, though I hope that my remarks may be helpful. But we feel that in the State of New Jersey we have developed a product which is responsive to the agency heads and to the citizens.

And I might just remark, that when the Governor's commission took testimony during that 10 days, 5 years after the creation of the office of administrative law, not one State agency asked to be pulled out of the central corps bill. Where, prior to its creation, there was almost, as I indicated, unanimous opposition by the cabinet officers to the creation of a central corps operation.

I might just want to go in, for the few seconds that I have got, to Mr. Cynkar's remarks which were made originally, and I think there is a misconception.

OAL in New Jersey is not here as a make-work project, or to take away the authority and responsibility from any cabinet officer.

We encourage in our rules that every agency make a diligent attempt to settle any grievances that the citizens have with those agencies, prior to making them a contested case. We have enough work as is; we do not need more work.

But if the citizens cannot resolve their grievances with an agency, based upon duly promulgated rules—and I was disturbed to hear him use the world handbook, because a handbook is not a duly promulgated rule which a citizen can readily get to through public notice.

Then they have a right to a fair hearing, and that is what a central corps of administrative law judges enables them to have. We do not want the work but the citizens are able to get to us to have their grievances heard.

There was a remark that he said, and I quote: "Disrupts the relationship with the agency, a central core." Perhaps that remark, more than any other, symbolizes what makes the OAL in New Jersey a solid agency. Because there is nothing to disrupt. We are not in, we are not of, nor are we part of any agency. We are an independent corps.

And perhaps as long as people continue to think that a hearing officer, an ALJ, is part of an agency, then the people's perception will be that they are not getting a fair hearing. Thank you, Senator.

[The statement follows:]

PREPARED STATEMENT OF RONALD I. PARKER

Mr. Chairman and members of the Committee: I am delighted to have the opportunity to appear before you on behalf of the agency it has been my pleasure to serve since its creation some seven years ago, the New Jersey Office of Administrative Law.

By way of background, the activities of the Office of Administrative Law touch the lives and livelihoods of virtually every citizen of New Jersey. Through both our rulemaking and hearing functions, we deal with issues which impact on their personal conduct, and the way they conduct their business. And, I should add, our responsibilities continue to grow.

The caseload of the Office of Administrative Law, on its contested case side, is extremely varied. It includes the review of very complex issues with wide social consequences, such as environmental protection, fair housing and multi-million dollar rate increases to cases affecting the single individual as in hearings to determine the extension or denial of welfare benefits or the validity of a proposed suspension of a driver's license. OAL hearings are presided over by Administrative Law Judges who are charged with the responsibility of rendering initial decisions.

In 1978, the New Jersey Legislature established the Office of Administrative Law, a central panel system designed for the fair and impartial adjudication of administrative law. Prior to 1978, New Jersey functioned with a cumbersome hearing system which had each administrative agency hiring their own hearing officers to conduct contested cases. In many instances these hearing officers were employees of the agencies having other duties, as well as part time employees paid on a per diem basis. Because there was no standardization of procedures, the format of the hearings varied from agency to agency. The former system was deficient in appearance as well as in substance. As I mentioned earlier, the hearing officer was hired, paid and given salary increases directly by the agency which was a party in the matter. In many instances, the private citizen involved in a contested case could not help but feel the deck was stacked against him. It was for these reasons that the New Jersey Legislature recognized the need for a change and a new mandate. That mandate, as expressed in the statement to the enabling legislation, called for, and I quote, "a full time corps of trained, skilled administrative law judges to expedite the process by which State administrative agencies decide contested cases, and to inject greater impartiality into that process".

OAL's success in satisfying the need for justice as well as the appearance of justice, through its contested case responsibilities, is best illustrated through the comments of the citizens and attorneys who have appeared before administrative law judges.

For example, a litigant involved in a pension dispute wrote:

> "I feel the judge's performance was outstanding. She has restored my confidence in the judicial system. I did not think it was possible for one individual to get a fair trial against the State. The judge was articulate. She took every detail on both sides into consideration."

From a litigant who lost a Racing Commission case:

> "I can't find enough adjectives to praise the judge's performance. Although I lost the case, it was an experience to be in front of a jurist of such fine caliber."

Regardless of the outcome of a case, people who appear at OAL hearings seem to feel they are receiving a greater degree of impartiality and fairness. Overall, more than 75 percent of the comments received from random questionnaires sent to litigants and attorneys have been favorable.

This represents to me, that the central panel system has met its mandate. For example, the present system is a vast improvement for the members of the State bar, New Jersey now has standardized procedures in contested cases. The system has also benefited State agencies, The Agency heads, who by New Jersey law must make the final determination in contested cases, now receive initial decisions based on findings of fact and conclusions of law from an unbiased and independent administrative law judge. The courts have benefited by receiving a record they can universally rely on. However, the main benefactor has been the general public. No longer is the hearing officer an agency employee, but rather an independent, full time, trained, professional judge who does not rely upon the agency for his office, supplies, support personnel, hearing locations, salary or salary increases.

There have been many other advantages the State of New Jersey has received from this system. Our strong working relationship with the agencies has furthered our ability to accommodate their needs with regard to their contested cases and assist them in their rulemaking responsibilities. In many instances, we have developed procedures that are tailor-made to the specific agency case areas, in particular for the Departments of Insurance, Education and Human Services.

Just to give you some idea of the results of this inter-agency cooperation, I would like to cite some examples. OAL's specific conference procedures developed for the Department of Community Affairs, particularly for fire safety cases, have helped us to reduce an 800-case backlog to the point where we are now current. With the Division of Motor Vehicles, our use of telephone conferences and hearings conducted on written submissions without personal appearances has expedited their caseload. For the Department of Human Services we conducted an extensive experiment in one New Jersey county involving welfare hearings whereby one of our judges would spend an entire day in the county in conjunction with a member of the Division's staff just conducting settlements and hearings. This experiment has resulted in the establishment of a statewide system for expediting all Human Services cases through the tailor-made rules I mentioned earlier. Through an agreement with the Department of Transportation, OAL has taken on the role of investigator by conducting hearings to determine the need for heliports. We are also working on developing new techniques for hearing pension cases.

Regarding contested case efficiency, OAL continues to process cases better and faster than they were processed under the former hearing officer system. For example, the central panel system allows an administrative law judge the ability to hear contested cases, on the same day, from different agencies, while conducting hearings in the field. Further, the centralization of the hearing function has resulted in demonstrable economics of scale. By comparison, the State cost for the hearing process eight years ago was more than five million dollars. The overall New Jersey State budget at that time was $4.1 billion. Today, the overall State budget totals $8.9 billion. OAL's budget for the hearing process is $6.2 million. In other words, since the creation of OAL, State spending has increased over 100%, while contested case costs have only increased by 24%. This has all been accomplished despite the fact that our caseload has doubled since 1979, while our initial staff size has been reduced.

Over the past three years OAL has been the subject of comprehensive evaluations by government officials and representatives of private business. The Governor's Committee on the Office of Administrative Law found our operations to be "well and efficiently run." In fact, the opening paragraphing preceding the recommendations of the Governor's Committee stated, and I quote: "The Committee's investigation led to a conclusion that the OAL was an efficient, well-run organization which represented a significant improvement over the former hearing system in terms of quality and productivity." Thus persons independent of OAL have concluded that OAL has been successful in realizing many efficiencies in operations. Our program has demonstrated an exceptionally high degree of cost-effectiveness and fiscal integrity throughout. Through strong internal management, the OAL has fielded innovative reforms in the administrative adjudicatory system but always within fiscal realities.

All in all, the Office of Administrative Law has brought order to the system of administrative adjudication. We have brought to the State a fairer and more objective forum for hearing administrative cases. Many more cases are being resolved and handled by our 44 administrative law judges than were by the 130 hearing officers under the old system, and they are being resolved through quality decisions. This is reflected by the fact that 92 percent of OAL initial decisions are accepted by the respective agency heads. Taken a step further, our decisions continue to be well received by the New Jersey Appellate and Supreme Courts. Our judges are being specifically named in the opinions of the aforementioned courts and commended for their thorough and insightful decisions. We have, in sum, streamlined and improved that portion of the administrative process which has been committed to us.

The central panel system allows for continuing improvement as well. For example, we have recently established a Senior Judge Corps. This Corps, consisting of six judges, will, among other duties, consult and assist the administrative law judges in the handling of their contested cases, and assist in developing appropriate judicial education programs designed to increase the expertise of the judges.

With regards to judicial education, throughout the year, the New Jersey Office of Administrative Law conducts voluntary and mandatory training sessions to update the judges on changes in the laws or to provide them with further instruction on complex or developing case areas. Often the training sessions are initiated by the judges themselves to expand their knowledge and expertise of particular case areas where they may desire additional background. A sampling of past sessions includes conferences on ratemaking, welfare benefits, teacher seniority, auto insurance surcharges, and affirmative action.

In addition, OAL organizes an annual intensive education session. Our judges also occasionally travel to training sessions on specific case topics (such as utility ratemaking), and to educational programs at university law schools, and the National Judicial College in Nevada.

To state it succinctly, the central panel system has proven to be a success for the citizens of New Jersey.

Senator **Heflin**. Thank you. We appreciate your testimony today. Our next witnesses are a panel consisting of Hon. Joseph B. Kennedy, administrative law judge, Federal Mine Safety and Health Review Commission, for the Forum of Administrative Law Judges; Hon. Mary Ellen Benard, administrative law judge, National Labor Relations Board, for the Forum on Administration Law Judges; Hon. Nahum Litt, chief administrative law judge, U.S. Department of Labor; and Hon. William E. Fowler, Jr., chief administration law judge, National Transportation Safety Board.

Judge Kennedy.

STATEMENTS OF A PANEL CONSISTING OF HON. JOSEPH B. KENNEDY, ADMINISTRATIVE LAW JUDGE, FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, FOR THE FORUM OF ADMINISTRATIVE LAW JUDGES; HON. MARY ELLEN BENARD, ADMINISTRATIVE LAW JUDGE, NATIONAL LABOR RELATIONS BOARD, FOR THE FORUM ON ADMINISTRATIVE LAW JUDGES; HON. NAHUM LITT, CHIEF ADMINISTRATIVE LAW JUDGE, U.S. DEPARTMENT OF LABOR; HON. WILLIAM E. FOWLER, JR., CHIEF ADMINISTRATIVE LAW JUDGE, NATIONAL TRANSPORTATION SAFETY BOARD

Judge **Kennedy**. Thank you, Senator Heflin. I appreciate the opportunity to once again appear before this honorable committee to present the views, this time, of the Forum of U.S. Administrative Law Judges, in opposition to S. 673 and in support of S. 580.

On behalf of the forum I wish to express our appreciation, and at this time I wish to introduce to the committee, Judge Mary Ellen Benard, president of the Forum of U.S. Administrative Law Judges.

Judge Benard has filed for the record her formal statement on behalf of the forum and is prepared at this time to give a brief oral summary of our position and to answer any questions the committee may have.

I have prepared and submitted for the record a supplemental statement in support of S. 580, Senator Pryor's bill. I wish to make a brief oral statement after Judge Benard, if I may, and will be prepared to answer any questions the committee may wish to direct with respect to either bill.

Judge **Benard**. Thank you. I am an administrative law judge with the National Labor Relations Board and I am the president of the forum of U.S. Administrative Law Judges, whose members are 96 administrative law judges in 16 different regulatory agencies.

We appreciate the opportunity to testify today and the concerns that the subcommittee has demonstrated for administrative justice and for the judges who implement it.

As you undoubtedly know, S. 673 has both strong proponents and opponents in the community of administrative law judges. The vast majority of the Forum's members are numbered among the opponents.

The Forum opposes S. 673 because it would create a new bureaucracy which would serve no useful purpose and would be inimical to fair and efficient administrative proceedings.

Contrary to the assertions of the proponents, a corps of administrative law judges is not necessary to preserve our decisional independence. In that regard, I note that many of the abuses asserted by Chief Judge Litt in his position statement are actions which were allegedly perpetrated by chief judges. To the extent that this is a problem, it certainly would not be solved by S. 673 which gives chief judges more power than they have now.

Second, although there have been intrusions upon the independence of judges at the Social Security Administration, those problems can and should be resolved by specific legislation designed to address them, such as S. 580, not by separating all administrative law judges from the agencies whose cases they hear.

Generally, our independence is secured by the Administrative Procedure Act, and there is no evidence of legislative, public or judicial concern over the fairness of the administrative process except at the Social Security Administration.

To the contrary, it is noteworthy that two sections of the American Bar Association, the section on administrative law and the section on labor and employment law have opposed establishment of a unified Governmentwide corps of the type envisioned by S. 673.

In that regard I should note that I must take issue with Judge Palmer. Our position statement refers to the administrative law section's opposition to a Governmentwide corps.

It is true that at a meeting in April 1985, in your home State of Alabama, the council of that section, by consensus, suggested creation of a panel of administrative law judges on an experimental basis, that would serve the agencies that now have one, or just a few judges. But there has yet been no action by the section on administrative law in favor of a Governmentwide corps. A section on labor and employment law unanimously opposed it, and we think that is extremely important when it is considered that that council is composed of private practitioners primarily, some of whom represent management, and others represent labor.

Surely if they felt that there was a widespread lack of independence of administrative law judges, the practitioners would be in favor of a unified corps.

We also disagree with the proponents of S. 673 that problems with the existing loan program point up the need for a corps of administrative law judges.

The problems are caused by the different needs of the various agencies, and creation of a corps would do nothing to solve them.

It is true that loaned judges can efficiently handle certain types of proceedings, and the loan program administered by the Office of Administrative Law Judges effectuates loans, where appropriate.

As we noted in our written statement, the Office of Administrative Law Judges is presently revising its regulations on the loan program, and is also in the process of establishing standard financial agreements to speed the processing of loan requests.

Not only is a centralized core unnecessary; we believe it would actually hamper the work of administrative agencies.

First, under this legislation, agencies would lose the vital rights to establish procedural rules for their cases and to manage their caseloads.

Second, the basis for the administrative law system is agency expertise, which in turn frequently depends upon the expertise of the judges who hear the agencies' cases.

Although S. 673 provides, initially, for various divisions according to legal specialties, those divisions may be changed, or abolished by the Council of Chief Judges are the corps is created. Thus, there is no assurance whatsoever that specialized expertise, the raison d'etre of the administrative law system will be preserved.

Further, creation of a corps of administrative law judges would not foster efficiency. The approximately 740 judges of the Social Security Administration are dispersed in more than 100 locations around the country, and only a few of the judges who hear cases for other agencies are in the same locations.

The only judges who could feasibly be put under one roof are the 200 located in Washington, and there is no showing that unification of these judges would result in any real cost savings. To summarize, the forum feels that the present system is working well, and since it is not broken, there is no need to fix it.

We therefore oppose creation of a corps of administrative law judges. Thank you for this opportunity to express our views.

[The statement follows:]

PREPARED STATEMENT OF MARY ELLEN BENARD

Introduction

The Forum of United States Administrative Law Judges is an organization of administrative law judges in approximately 16 federal agencies. Our principal purpose is furtherance of the public interest in improving the administrative process.

On April 10, 1986, the Executive Committee of Forum, comprising one delegate from each agency employing Forum members, voted unanimously to oppose S. 673 and H.R. 451 and H.R. 1213. In our view, creation of a separate unified corps of federal administrative law judges would be inimical to the fair and efficient functioning of administrative proceedings. [1]

The Executive Committee also voted to support S. 580, for we firmly believe that transfer of the more than 700 administrative law judges employed by the Department of Health and Human Services to a separate independent adjudicatory commission will enhance and ensure their judicial and decisional independence.

I. The Provisions of S. 673

S. 673 would place all of the more than 1000 federal administrative law judges in a new agency designed to hear cases assigned to it by other federal agencies such as those which currently employ administrative law judges. The administrative law judges would be grouped in one of from four to ten divisions, each of which will hear cases in certain legal specialties; assignment of a judge to a specific division would be made "after consideration of the areas of specialization in which the judge has served."

The corps would have a chief judge who would be appointed by the President with the advice and consent of the Senate. Each division would also have a chief judge; the chief judge of the corps and the division chief judges would constitute a Council of the Corps which would be the policymaking body of the agency. The initial group of division chief judges would be appointed by the President with the advice and consent of the Senate. Subsequent division chief judges would be appointed by the chief judge of the corps with the approval of the Council.

The Council's authority includes, inter alia, the power to assign judges to divisions and transfer or reassign them from one division to another, to abolish, create or reconstitute divisions of the corps, to appoint judges, and to prescribe rules of practice and procedure for the conduct of proceedings before the corps, except that the Council could not for two years revise rules that have been prescribed by agencies prior to enactment of S. 673 without the approval of the affected agency. The Council also would have the authority to take adverse actions against administrative law judges.

II. The Purported Advantages of a Corps

A. The Actual and Perceived Independence of the Federal Administrative Judiciary

1. Administrative Law Judges' Independence from the Agencies Whose Cases They Hear

Proponents of a corps argue that placing federal administrative law judges in a separate agency would make them more independent, since they would no longer be employed by the agency which conducts the investigation and prosecution of the cases and would not be housed with other agency personnel. In our view, this argument misconstrues the true nature of judicial independence and addresses a non-existent problem.

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[1] As of April 10, 1986, Forum had approximately 96 members. Although the vast majority of our members are opposed to these bills, a small minority of members are in favor of a unified corps of administrative law judges.

The independence of administrative law judges, vis-a-vis the agencies, means freedom to find facts, make a decision based on the judge's best assessment of the record in the light of agency policy, and render decisions without fear of retaliation or discrimination in any form because of the decision reached. The importance of these freedoms is recognized in the Administrative Procedure Act, 5 U.S.C. 551 et seq., which applies to the vast majority of cases heard by administrative law judges. Thus, the Administrative Procedure Act requires that an administrative law judge may not consult a party on a fact in issue unless all parties are notified and given an opportunity to participate in that discussion, that an administrative law judge may not be responsible to or supervised by someone who performs investigative or prosecutorial functions for an agency, and that any agency employee who is engaged in such functions in any case may not be involved in the agency's decision or review of that case.

Also importantly, the Administrative Procedure Act provides that administrative law judges may be removed only for good cause. Their classifications and pay are established by the Office of Personnel Management and not by the agencies which employ them. In addition, administrative law judges are separated from other agency personnel, are assigned cases in rotation insofar as practicable, and must make their decisions on the record. Further, they may disqualify themselves from cases where they believe they have a potential conflict of interest and are protected from assignment to other agency duties. These are aspects of the status of administrative law judges which are critical to their independence in making decisions.

Additional protections have been included by Congress in several other enforcement programs. Thus, the National Labor Relations Act requires strict separation between the NLRB General Counsel and the five-member Board, its staff, and the administrative law judges. The National Transportation Safety Board, the Federal Mine Safety and Health Review Commission, and the Occupational Safety and Health Review Commission all have separate corps of administrative law judges who make final decisions subject only to appellate review by the Commission or Board. With respect to OSHRC and FMSHRC the review is discretionary. Indeed, an indication of the trust and high regard with which Congress views the administrative judiciary is that FMSHRC is required to apply the same standard in reviewing its administrative law judges' decisions that the courts traditionally apply to the Commission. Thus, findings by the Commission's trial judges are final and conclusive if supported by substantial evidence. [2]

Proponents of S. 673 refer to the fact that agencies provide administrative law judges with office space and facilities as indicative of the judges' dependence on the agencies. However, the agency personnel who make the decisions regarding these matters report to the agency heads who set the substantive legal precedents which the administrative law judges follow. Just as federal district and appellate court judges do not establish their own budgets and make definitive determinations of what office space and equipment they will use, neither do federal administrative law judges. In both instances, judges are dependent on the decisions of others, whether agency heads or chief judges or Congress, with respect to these aspects of their working conditions.

Proponents also cite the determination of the Social Security Administration to control the volume of decisions and their outcome for the proposition that federal administrative law judges are subject to an inappropriate degree of control by the agencies. However, this is the only example of such a problem mentioned in various statements in support of S. 673, and we know of no others. Significantly, S. 580, a bill which would transfer Social Security Administration judges from the Department of Health and Human Services to an independent adjudicatory commission, is also pending before the Senate Committee on the Judiciary. We submit that such legislation fashioned to meet the discrete needs of the Social Security Administration administrative law judges is a more appropropriate and measured response to the problem than enactment of legislation that would, with no real justification, completely dissociate all agencies from the administrative law judges who hear cases arising under the statutes the agencies were created to administer.

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[2] Chacon v. Phelps Dodge Corporation, 709 F.2d 86, 90-92 (D.C. Cir. 1983).

2. The Perceived Independence of Administrative Law Judges

Proponents of a corps cite a perception among litigants that an administrative law judge employed by the agency prosecuting the case cannot be impartial as the persuasive reason for supporting establishment of a corps of federal administrative law judges. However, aside from widespread complaints of agency intrusion on the decisional independence of judges at the Social Security Administration, there is no evidence of public, legislative, or judicial concern over the fairness of the administrative process afforded by federal agencies. Indeed, in April 1985 the Council of the American Bar Association's Section on Administrative Law passed a resolution opposing establishment of a government-wide corps of administrative law judges. Further, at its 1985 Annual Meeting the Council of the ABA Section of Labor and Employment Law, a group composed of both management and union labor law practitioners, unanimously passed a resolution opposing establishment of a corps of administrative law judges. If there were any real indications that administrative law judges are not independent of the agencies whose cases they hear, the attorneys who practice before the agencies would have been the first to seek changes in the present system.

Decisions of the Supreme Court and the federal courts of appeals have recognized the fairness of the present administrative process and the adequacy of the protections afforded by the Administrative Procedure Act. See, for example, Butz v. Economou, 438 U.S. 478 (1978); Marshall v. Jerrico, 466 U.S. 238, 250 (1980); NLRB v. Permanent Label Corporation, 657 F.2d 512, 527-528 (3d Cir. 1981); Nash v. Califano, 613 F.2d 10 (2d Cir. 1980); Benton v. United States, 203 Ct. Cl. 263, 488 F.2d 1017 (1973).

B. Efficient Use of Administrative Law Judges

Proponents argue that establishment of a corps of administrative law judges will result in increased efficiency and flexibility in the assignment of administrative law judges to cases, on grounds that (1) current programs under which administrative law judges are loaned from one agency to another are not successful, and (2) the establishment of a corps of administrative law judges will permit case assignments to be adjusted so as to respond to the various peaks and valleys of individual agency caseloads.

In our view, to the extent that the current loan program has not been wholly successful, experience demonstrates the impracticality of moving judges on a large scale from the work of one agency to any other and the undesirability of a corps which would facilitate such movement. Many federal agencies find it important for the administrative law judges who hear the agency's cases to have some expertise in the specialized field of law administered by the agency. Thus, it is frequently less efficient, in terms of achieving initial decisions which reflect an understanding and knowledge of the relevant facts and legal principles at issue, for judges experienced in one area of the law to hear cases in another. The price of this decreased efficiency is measurable not only in the costs to agencies but in the increased time necessarily spent by attorneys, who must prepare longer and more detailed briefs and arguments to persuade inexperienced judges.

It is true that less complicated administrative proceedings can be efficiently handled by transferred judges. It is also true that some agencies require the services of administrative law judges only sporadically, while others find that temporary decreases in their caseloads enable them to make some of their administrative law judges available to hear other cases. The existing loan program administered by the Office of Administrative Law Judges within the Office of Personnel Managment is meeting the needs of agencies in both categories.[3]

Indeed, the Office of Administrative Law Judges is currently revising the regulations which apply to the loan program and is also encouraging agencies to establish standard financial agreements to facilitate the processing of requests for loaned judges. It should also be noted that under recent legislation the Office of Administrative Law Judges can make retired administrative law judges available to hear cases when needed. We believe that the efforts being made to revise and update the present system will be successful, and that there is no need to establish a whole new bureaucratic structure to facilitate temporary transfers.

C. Efficient Use of Facilities and Support Personnel

Proponents of S. 673 urge that establishment of a centralized corps would result in significant savings to the taxpayers because it would avoid the necessity of various agencies duplicating each other in the purchase and maintenance of case docketing and tracking systems, preparation of reports for Congress and the public, and the expenses of support personnel. However, the proponents have offered no supporting data for the assertion that establishment of a new federal agency would result in decreasing the net cost of administrative proceedings at the trial level. Indeed, consideration of the personnel, facility, and equipment requirements of a corps indicates that the contrary may be true.

First, establishment of a corps would entail the transfer to the new agency not only of administrative law judges, but of all support personnel as well. Thus, the new agency would need to be equipped as a full-scale bureaucracy, complete with secretaries, paralegals, clerks, and administrators. There are currently more than 1000 administrative law judges; consequently, the total employee complement of the new agency could easily exceed 5,000.

Second, the approximately 740 administrative law judges who hear Social Security Administration cases are dispersed throughout the nation in more than 100 locations. Only a few of the administrative law judges who work for other agencies are located in the same cities. Therefore, the only judges readily available for merger under the same roof and with a single support staff are the approximately 200 administrative law judges located in Washington, D.C. Whether unification of these relatively few administrative law judges would result in any significant savings in the cost of office space, law clerks, libraries, docket clerks, travel offices, and hearing rooms is, at best, a matter of some conjecture.

Third, although there may be some duplication between agencies in the personnel and equipment required to support trial level administrative proceedings, agencies currently pay for some equipment and services which they share with administrative law judges, such as personnel departments, libraries, and travel offices. If the administrative law judges are placed in a separate corps, the new corps will have to supply this support, but, as the agencies will need to maintain their existing services whether the administrative law judges use them or not, the cost to the government of administrative proceedings will increase, not diminish.

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[3] See, 5 CFR Sec. 930.213.

D. The Potential for Improving the Quality of Administrative Law Judges

Proponents of the S. 673 suggest that if federal administrative law judges are placed in a separate agency qualified applicants will be attracted by the prospects of more independence and hearing a greater variety of cases. These claims are illusory.

First, S. 673 actually diminishes the independence of administrative law judges rather than increasing it, for it grants the Council absolute power to create or abolish divisions and to transfer judges from one division to another. Thus, an administrative law judge can readily be transferred against his will to hear cases in a field of law in which he lacks expertise. Furthermore, the notion that qualified attorneys would be more likely to apply to become administrative law judges if there were a centralized corps does not take into account that many administrative law judges sought the position because it enables them to use the skills and expertise they have developed through years of practicing in a specialized field of law; if there is no assurance of hearing cases in that field, many of these highly qualified practitioners may be dissuaded from becoming administrative law judges.

Further, S. 673 provides that an administrative law judge may be involuntarily reassigned to a new permanent duty station by the Council, subject only to the requirement that the Council give the judge a written explanation that the reassignment is required to meet substantial changes in workloads. In addition, disciplinary actions, including removal, are initiated by this Council. It is especially significant that members of the Council are appointed by the Chief Judge, with the approval of the Council. Qualified applicants are not likely to be attracted to positions where there is no guarantee either that they will continue to work in their legal specialty or that they will not be required to uproot themselves and their families against their will.

Last, the purported attraction of hearing a greater variety of cases ignores the policy that certain types of matters should be adjudicated by administrative agencies with particular expertise in the subject matter and political accountability. Thus, this benefit, if it is one, can be achieved only by subverting the administrative process.

III. The Significance of the State Central Panels of Administrative Law Judges

Proponents of S. 673 suggest that the central panels of administrative law judges used in some states constitute a precedent for establishment of a similar system for federal administrative law judges. However, the comparison is not justified. Those states which adopted central panels previously had no guarantees of independence for administrative law judges comparable to those provided in the federal Administrative Procedure Act, and still fail to provide some of the more fundamental guarantees that exist in the federal system. For example, non-political merit selection, independence from agency advocates, insulation from agency determination of pay and disciplinary matters, and high standards of professional qualification for administrative law judges were not found in these systems before central panels were established (and to some extent not after they were established, either). The central panels in the states are relatively small, and in most states, despite their characterizations as central panels, do not embrace all of those within the state who perform administrative law judges' functions. In establishing central panels, the states are moving from conditions comparable to those which disappeared at the federal level 40 years ago, and still fail to provide all the protections necessary to guard independence which federal administrative law judges have long enjoyed.

IV. The Adverse Impact of a Corps on Administrative Proceedings

Establishment of a new federal agency comprising administrative law judges and support personnel is likely to have a substantial and adverse impact on federal administrative proceedings. Agencies which currently utilize administrative law judges are likely to resist creation of a new agency, and there is a possibility that some agencies will choose to lessen their use of administrative law judges as to those types of cases which do not require a hearing on the record under the Administrative Procedure Act. Significantly, S. 673 provides, as discussed above, that the Council shall have the power to prescribe rules of practice and procedure, a provision which nullifies the agencies' long-held authority to prescribe rules and time limitations appropriate for the kinds of cases they are commissioned by Congress to decide.

A wide variety of cases arising under numerous statutes are decided in administrative proceedings. The basis for the current system of administrative decision-making is that administrative agencies can develop expertise in a given subject and utilize that expertise in making governmental decisions relating to that subject. Many of the agencies which currently employ administrative law judges have traditionally preferred to hire judges who had considerable experience in the agency's legal specialty. However, there is no assurance that a corps of administrative law judges would preserve this expertise.

Under the current system, the agency head or his designee controls the agency's case docket, hires administrative law judges in accord with the anticipated caseload, and prescribes rules of procedure tailored to the types of cases which that agency is required to decide. If a corps of administrative law judges is established, however, agencies will necessarily lose all these powers. Many agencies, such as the National Labor Relations Board, the Occupational Safety and Health Review Commission, and the Federal Mine Safety and Health Review Commission, have as a primary function the hearing and deciding of cases arising under a specific statute. A substantial majority of the cases decided by the heads of these agencies come before them on exceptions to administrative law judges' decisions. If the agencies cannot determine how many administrative law judges will be assigned to their cases, they lose a significant part of their power to determine how speedily the statutes they implement will be enforced and to insure the efficiency of their operations.

Federal agencies must presently justify the numbers of administrative law judges they seek to employ in light of the mission of the agency and their projected caseload. This is an integral part of the agency's overall planning and budget process. The chief judge of a corps would be in a poor position to speak for other agencies on these matters. Thus, in order to determine staffing and other budgetary requirements of the corps, the chief judge must either engage in ongoing and extensive consultation with some 30 other agencies or act independently without the knowledge to act intelligently. In consequence, the budget process will necessarily become either more complicated or less accurate.

Conclusion

We urge the Committe not to recommend passage of S. 673. We recognize that there are serious concerns about the potential for agency intrusion upon the decisional independence of administrative law judges who hear cases for the Social Security Administration. However, these concerns can readily be met by discrete legislative solutions, [4] without the necessity of establishing a separate agency to house all federal administrative law judges, and the other problems which such a corps would purportedly address either do not exist or are not likely to be resolved by creating such an agency.

The proponents of a corps have the burden of showing that creation of a new agency is needed and will improve the adminstrative process. They have failed to carry that burden and instead have proposed changes to the present system which would only make administrative adjudication more cumbersone than it is at present.

Mary Ellen Benard

Mary Ellen Benard, President
The Forum of United States
Administrative Law Judges

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[4] A better solution for the problems faced by the Social Security Administration judges, we believe, is to provide them with their own specialized corps administered by their own independent adjudicatory agency. This is the thrust of S. 580, the proposed HHS Review Commission bill. This bill, introduced by Senator Pryor on March 5, 1985, is designed to enhance the stature and protect the independence of Social Security Administration Judges.

Judge **Kennedy**. Senator Heflin, if I may. My position in opposition to the unified corps bill has been made clear on many occasions and I have no intention of repeating them here.

However, when and if a corps of any description is ever established, I would urge that in order to preserve the present merit selection system, and to avoid the pitfalls of politicizing the corps, provision be made for appointing division chief judges on the basis of seniority from among those judges transferred to each of the divisions provided for, with rotation biannually, and for selection by them of a chief administrative judge whose duties and function will embrace only the administrative functions of the corps, and not the supervision or discipline of the trial judges.

The chief administrative judge should serve for a fixed term of 5 years with eligibility for reappointment. One other comment on S. 673. I have noted that in the proponents' statements they have set forth an estimate of some cost savings of $30 to $40 million; however, I do not know the basis for that.

It has been suggested to me, if that were going to be accomplished, we would probably have to RIF 200 or 300 judges in order to accomplish those savings and maybe that is what is intended.

I also have made some calculations myself, and while the proponents have never furnished an estimate, there can be no doubt that the proposed corps will be substantial in size, not less than 4,000, or more employees. And expensive. A rough estimate of its cost, conservatively figured, shows that one, if it is assumed that the direct cost of salaries for judges would be approximately $84 million—that is 1,200 judges at $70,000 a year—and that the cost of normal support staff and other overhead will approximate 50 to a 100 percent of direct salary—and that is the rule of thumb that OPM uses—then the total cost of the corps bill, at its inception, will be approximately $126 million to $186 million.

Figures recently received, however, show that because of the high ratio of staff to judges in the Social Security Administration, approximately 5 to 1, this cost is probably very conservative and could escalate quickly to as much as $300 or $350 million.

Now turning to S. 580. S. 580 is a bill introduced by Senator Pryor at the request of a group of administrative law judges of the Department of Health and Human Services in March 1985.

It proposes separation of the adjudicatory function presently performed by the Office of Hearings and Appeals from the Social Security Administration, and to transfer it to an independent review commission responsible for the administrative review of all DHHS cases. Such action would be comparable to the organizational structures found in the Federal Mine Safety and Health Review Commission, OSHRC, the National Transportation Safety Board and the National Labor Relations Board.

Enactment of this bill should result in no additional cost to the Government.

This committee is aware, we are sure, of the recent expression of deep concern by the SSA judges and the Federal Administrative Law Judges Conference over an OHA program known as the reconfiguration policy.

I think Judge Barlow, at my urging, has included that in her statement. The SSA judges firmly believe this policy is designed to impair their decisional autonomy and functional independence as well as the due process right of claimants to receive individualized, well-reasoned, quality-crafted decisions.

OHA simply will not accept the fact that the Social Security Act and the Administrative Procedure Act contemplate that decisions by administrative law judges in disability cases must be individualized determinations based on substantial evidence adduced at hearings regulated and controlled by the judges.

The caseload at SSA also tends to magnify the irreconcilable differences in the approach of management and the adjudicators to revolution of the factual and policy disputes in disability cases. The new reconfiguration policy is perceived by the judges—and I think correctly—as designed to remove their control over their staffs, and the processing of these cases, and to ensure the mass production of decisions to meet management quotas.

The problems endemic to the present system at SSA can be solved by a reassignment of those judges to an independent commission accountable only to Congress and the public.

Only by such a bill of divorcement can Congress and the public be assured of a Social Security system of adjudication, particularly at the appeals level, that is grounded in fairness and free of institutional bias, control and pernicious policy considerations.

Because it will provide SSA judges with their own specialized corps administered by their own independent adjudicatory agency, no additional cost to the Government will result from enactment of S. 580.

It provides a better solution, we think, to problems faced by the SSA judges than S. 673. As the hearings before this committee in September 1983 demonstrate, the concept embodied in S. 580 enjoys widespread support among the administrative judiciary, the SSA Judges Association, the Federal Administrative Law Judges Conference, and more recently, this organization, that is, the Forum.

In an article in the December-January 1986 issue of "Judicature," Prof. Donna Price Cofer, who has testified here this afternoon, of the University of Missouri, surveyed the current status of the independence of SSA judges, and concluded S. 580 may be the best answer to the continuing incursions on decisional independence of SSA judges by the Department of Health and Human Services.

Because S. 580 enjoys widespread support from all points of the spectrum of the administrative judiciary, will insulate SSA judges from prejudicial agency pressures and will restore public confidence in the fairness of the SSA appeals process. The Forum urges this committee to give early consideration to its markup and movement through the legislative process.

Thank you, sir.

[The statement follows:]

PREPARED STATEMENT OF JOSEPH B. KENNEDY

S. 580, a bill introduced by Senator Pryor at the request of a group of administrative law judges of the Department of Health and Human Services (DHHS) in March 1985, proposes separation of the adjudicatory function presently performed by the Office of Hearings and Appeals (OHA), from the Social Security Administration (SSA) and to transfer it to an independent review commission responsible for the administrative review of all DHHS cases. Such action would be comparable to the organizational structures found in the Federal Mine Safety and Health Review Commission, the Occupational Safety and Health Review Commission, the National Transportation Safety Board and the National Labor Relations Board. Enactment of this bill should result in no additional cost to the Government.

Reconstituting OHA as an independent review commission will eliminate the ongoing tensions between the administrative and adjudicative functions of DHHS, enhance the appearance of justice, promote the quality of justice afforded SSA claimants, and provide for greater legitimacy and public confidence in the SSA appeals process.

This committee is aware, we are sure, of the recent expression of deep concern by the SSA judges and the Federal Administrative Law Judges Conference over an OHA program known as the "reconfiguration" policy. The SSA judges firmly believe this policy is designed to impair their decisional autonomy and functional independence as well as the due process right of claimants to receive individualized, well-reasoned, quality-crafted decisions.

SSA, the component under which OHA now functions, has been unable, conceptionally, to deal with the role of OHA's administrative law judges and their decisional independence. This independence which is guaranteed by Section 7 of the Administrative Procedure Act, 5 U.S.C. § 556(c), has resulted in extremely strained relationships, protracted and expensive litigation, low morale, constant tension between the judges and their erstwhile staffs, and great disservice to the public. The Social Security Administration apparently has great difficulty in distinguishing between its authority to make policy and the judges responsibility and authority to determine the application of policy on a case-by-case basis. See Parker v. Heckler, 763 F. 2d 1363 (11th Cir. 1985).

SSA, OHA simply will not accept the fact that the Social Security Act and the Administrative Procedure Act contemplate that decisions by administrative law judges in disability cases must be individualized determinations based on substantial evidence adduced at hearings regulated and controlled by the judges. The caseload at SSA also tends to magnify the irreconcilable differences in the approach of management and the adjudicators to resolution of the factual and policy disputes in disability cases. The new reconfiguration policy is perceived by the judges as designed to remove their control over their staffs and the processing of these cases and to ensure the mass production of decisions to meet management quotas.

The problems endemic to the present system can be solved by reassignment of SSA ALJ's to an independent Commission accountable only to Congress and the public. Only by such a bill of divorcement can Congress and the public be assured of a Social Security system of adjudication, particularly at the appeals level, that is grounded in fairness and free of institutional bias, control and pernicious policy considerations.

Because it will provide SSA judges with their own specialized corps administered by their own independent adjudicatory agency at no additional cost to the Government, we believe S. 580 provides a better solution to the problems faced by the SSA judges than S. 673. As the hearings before this committee in September 1983 demonstrate, the concept embodied in S. 580 enjoys widespread support among the administrative judiciary, the SSA Judges Association, the Federal Administrative Law Judges Conference and, more recently, this organization.

In an article in the December-January 1986 issue of Judicature, Professor Donna Price Cofer of the University of Missouri surveyed the current status of the independence of SSA judges and concluded S. 580 may be the best answer to the continuing incursions on decisional independence of SSA judges by DHHS. Based on her close association with the problems of SSA judges she concluded that "the creation of a truly independent ALJ Corps housed within a Health and Human Services Review Commission" would enable SSA judges to perform their adjudicatory function free of the agency's pressures to modify and control their decisional process.

Because S. 580 enjoys widespread support from all points of the spectrum of the administrative judicary, will insulate SSA judges from prejudicial agency pressures and will restore public confidence in the fairness of the SSA appeals process, Forum urges this Committee give early consideration to its markup and movement through the legislative process.

Senator **Heflin**. We have a vote on and I am going to leave and come back. Maybe I can ask you a couple of questions and finish up with you, Judge Kennedy, and Judge Benard.

What is the size of the membership of the Forum of Administrative Law Judges?

Judge **Benard**. The membership? Ninety-six administrative law judges from, I believe it is sixteen agencies.

Senator **Heflin**. It is my understanding that the Forum does not allow Social Security ALJ's to become members. You testified here in favor of a bill that would only affect and benefit Social Security judges. Will you explain that?

Judge Benard. I would be glad to. First of all, the Forum does not accept as members Social Security judges, not because we have anything against them. We do not. Many of our members are also members of the Conference of Administrative Law Judges, and the Federal Administrative Law Judges Conference.

However, we felt that because the Social Security judges outnumber everyone else by about 3 to 1, and because they are already members of the other two large organizations and have their own organization, we needed a new organization which could address the concerns of other agencies as well.

Consequently, we decided that the only way that we could accept Social Security Administration judges into membership was if we had a very rigid system of only one agency, one vote, and no membership votes on anything, and we did not think that would be acceptable.

We support S. 580 because we believe that it is an excellent alternative to a unified corps of all Government agency administrative law judges.

Senator **Heflin**. You do not differ with the principals expressed in S. 580?

Judge **Benard**. That is correct. We agree with them.

Senator **Heflin**. All right. I am going to go vote and come back.

[Recess.].

Senator **Heflin**. All right. Judge Litt, we would be glad to hear from you.

Judge **Litt**. Thank you very much for inviting me, Senator Heflin.

Judge Benard indicated that it was not broken, it does not need fixing. It is broken; it does need fixing. She does not quite remember how strong her statement was, but I recall 2 years ago, Judge Benard told me she would rather be unemployed than do black lung cases. She claims that it is just a personal preference.

Quite frankly, this Government pays her salary, and if she has little work, as I think is currently the case at the NLRB she should be detailed to other agencies, along with other judges that can help agencies with significant backlogs. Examples of his management technique can be seen in court systems. Superior court judges in the District of Columbia do small claims work and Federal district court judges try Social Security cases. I have never heard any of them say they would rather be unemployed than not do that kind of work.

Moreover, every argument I have heard on expertise is a red herring. There is no proposal before the Congress of the United States, and there never has been one, that would not use the expertise of those judges who have it.

No one proposes to use inexperienced judges when experienced judges are available. The fact is that there are judges available in almost every agency with prior experience in another field that could be utilized by agencies needing judges.

For example, recently, Judge Wagner, asked the chairman of the Federal Energy Regulatory Commission—the date was March 17—to hire two additional administrative law judges. His judges petitioned the agency not to do so on the basis that there would not be enough work in the future. On March 28 Judge Wagner reversed himself and indicated that he felt his agency should not hire two additional judges. As a matter of fact he urged the chairman not to hire them.

I do not know what caused Judge Wagner to change his mind. Although the letter states that there was newly discovered material, I do not know what that would be. The fact is that the campaign to not hire was started by judges who are nonveterans, who were fearful that the judges who would be hired would be veterans. It was couched in terms of the amount of work that would be done.

Right now, at the NLRB, there are two former FERC judges, who, under the current system, could not be borrowed. No agency is going to permit a judge, or several judges, to go for 1 year to another agency under current appropriations conditions.

The question was raised earlier concerning support at the American Bar Association. Let me say that the American Bar Association has several major sections that support the corps bill.

I was at Point Claire and as a matter of fact the ad law section did vote for an experiment which excluded Social Security and excluded the NLRB and the Federal Labor Relations Authority.

I have submitted written testimony which I would like to be incorporated. It is quite extensive. I have addressed two specific issues. The first is the claim that the system is not broken and does not need fixing because the only problem is Social Security, and there is some small fix that can be done for it. The second is the potential for cost savings under a corps system.

I would suggest to you that the history of the independent regulatory agencies that have been formed, similar to the review commissions, is a history that shows that they do not work all that well. OSHRC currently has only around 90 personnel and I think Federal Mine Safety Review Commission has around 40.

In fact, most of their personnel are judges. The agencies are very protective of them, even when the work is diminished, to the point of not making judges available to other agencies and permitting extremely light workloads to persist.

I have set that out in some detail in my testimony, and I have additional information which was all gleaned from public files.

I suspect that if the committee wanted to pursue it, it could get additional information from the agencies.

I am currently the chief judge of what is effectively the second largest office of administrative law judges. There are roughly 300 personnel at Department of Labor and we have 90 judges.

I was also chief judge of the Civil Aeronautics Board an economic regulatory agency having roughly 20 judges.

Neither the Department of Justice nor any of the opposing judges, speaking to cost savings, have done any real studies, and I do not believe any of them are in a position to make credible statements as to what the savings would be. As a matter of fact, Judge Kennedy went through a little litany concerning the possible savings. It currently costs $200,000, or so, per judge. You divide the judges by the total budget of the agency. At Social Security, the figure is roughly $200,000 at the Department of Labor, we also have highly repetitive work and each judge costs $165,000. We have large support staffs, and compared to other agencies, I think we are relatively efficient.

The cost savings under a corps system would be significant because today, you have many, many judges who are underemployed. They could be moved to agencies where they are needed, and the Government would not be hiring additional judges.

I submit that given the current workloads at both NLRB and OSHRC, and I would include mine safety and FLRA—just those four agencies alone—the combined number of under utilized judge would preclude the need for the Social Security Administration to hire judges, until such time as their workloads really do increase.

They have been projecting increases now for 2 years, which have not fully materialized, and yet they hired 35 judges in March, in anticipation of work that apparently may not arrive for another year.

And yet at the same time you have 35 judges, or more, sitting at NLRB, and a whole group at OSHRC who are really underemployed under any standard.

The studies which appear in this paper were performed solely on the basis of intake and dispositions. I gave no figures projecting what would happen under more efficient management. However, just at the outset, I would like to point out that I have been at three agencies—the Federal Energy Regulatory Commission as a judge; the Civil Aeronautics Board as the chief judge; and the Department of Labor as the chief judge.

Based on my experiences I can state categorically that a good law clerk would double the disposition level of a competent judge. I have witnessed this in economic regulatory cases that were 50,000 pages of transcript long and took 1 year to write, and I have seen it in cases which took 2 hours to try and 1 day to write.

A law clerk doubles the output of a competent judge. So therefore when you find an agency which has a lot of judges, and relatively few if any law clerks, I can suggest to you there would be savings almost automatically.

Turning to specific problems, the Environmental Protection Agency's chief judge told the Deputy Director at EPA about 1 year ago, that the chairman of the Administrative Bar Association Conference of Judges, a judge at EPA, was in favor of a central panel and uniform rules, which the chief judge thought was against agency policy.

He asked that her activities be curtailed and the Environmental Protection Agency refused to recognize her appointment to the Administrative Conference of the United States. I might add that she was chairman of a committee at the Administrative Conference on uniform rules. It is submitted that the agency's refusal to allow her to participate administratively in any professional association activities is harassment because of her views and support of this bill.

By the way, the chief judge is a charter member, participant, and strong supporter of Forum, all of which I presume he does on official time.

I might add that I have heard many explanations for discrimination, but the one I just heard, Judge Benard which attempts to legitimize discrimination against Social Security judges is one of the best. The original constitution of the Forum, not adopted but submitted, also precluded Department of Labor judges from being members because we are roughly 90 judges and we, too, support the corps bill, almost uniformly.

The loan program does not work. Last month, the Director of OPM's office of judges stated that he could not borrow judges even for individual cases.

Subsequent to that time, I understand, the NLRB has in fact offered to take almost all cases that come down the pike for the financial community, and is doing both case management, according to Chief Judge Wells, and is handling their cases at trial.

But that does not amount to a lot of work. While those numbers might look impressive, 97 percent—no, I think a little less—93 percent of the cases that are referred by the financial community settle, so for every hundred cases you get there are only seven going to go to trial.

Therefore, figures might show that 200 judges were borrowed, but what it does not tell you is that that workload only accounts for maybe 15 cases a year.

When we tried to borrow judges from several agencies, we ran into very significant problems, because the Department of Labor was saying, "We need judge-years. We don't want one."

I asked for 5 to 10 judge-years from Social Security and I was refused. We brought some political pressure, quite frankly, both within the Department of Labor and the administration, and on the Hill, and we finally were able to borrow nine judges in 1984; we were able to borrow seven in 1985.

However, we were double-billed for those judges and we have had a dispute running over those billings. The billing was 113 percent of salary plus an incredible amount additional.

The net result of that is that we do not estimate that based on our budget, we can borrow judges, if we are going to be overcharged.

There is no assurance, by the way, that anything worked out at OPM will be other than general, in terms of what an agency should do. We understand now that the Social Security Administration has effectively precluded us from borrowing judges, despite the under-utilization factor, by imposing a 50-percent demand of payment in advance, as well as keeping the 113-percent surcharge, as well as adding on every possible cost you can imagine. We figured that it cost double what it would cost to do it in-house, and we literally cannot afford it.

And this is the cost to the Labor Department of borrowed judges who are currently not fully employed. I know I have run over my time, but let me say one other thing here.

Every agency and every administration has had difficulty with some judges. The Carter administration, for example, had the same problems with Judge Kennedy as the current Reagan administration has, even though I am sure you will be told that this is something that is new and different.

But regardless of the merits of problems that agencies have with judges, the agencies are not equipped to handle them. The only thing an agency can do effectively is to bring a charge before the MSPB. I think it is Judge Goodman who has a $220,000 bill for lawyers fees alone arising from charges before the MSPB. Additionally, an agency that effectively brings a charge against a judge is accused automatically of having attempted to influence the judge and affect his independence. Thank you very much.

[The statement follows:]

PREPARED STATEMENT OF NAHUM LITT

THANK YOU FOR INVITING ME TO TESTIFY. I AM THE PAST PRESIDENT OF THE FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE AND A PAST CHAIRMAN OF THE NATIONAL CONFERENCE OF ADMINISTRATIVE LAW JUDGES OF THE AMERICAN BAR ASSOCIATION. CURRENTLY, I AM THE CHIEF JUDGE AT THE DEPARTMENT OF LABOR. MY CAREER STARTED AT THE INTERSTATE COMMERCE COMMISSION AS AN ATTORNEY IN THE SECTION OF PROCEEDINGS. SUBSEQUENTLY, I MOVED TO THE GENERAL COUNSEL'S OFFICE AND LITIGATED CASES BEFORE ARTICLE III COURTS. IN 1971 I WAS APPOINTED AN ADMINISTRATIVE LAW JUDGE AT THE THEN FEDERAL POWER COMMISSION, AND IN 1977 TO THE POSITION OF CHIEF JUDGE AT THE CIVIL AERONAUTICS BOARD. MY CURRENT APPOINTMENT AS CHIEF JUDGE AT DOL OCCURRED IN 1979.

DOL'S OFFICE OF ADMINISTRATIVE LAW JUDGES HAS 90 JUDGES SPREAD OUT IN EIGHT OFFICES AROUND THE COUNTRY AND OPERATING ON A BUDGET OF ABOUT $16 MILLION. IN FY 1985 WE DISPOSED OF ALMOST 13,000 CASES, RANGING ACROSS SOME 70 STATUTES. EXCEPT FOR RATEMAKING, WE PARTICIPATE IN EVERY FUNCTION PERFORMED BY ADMINISTRATIVE LAW JUDGES ANYWHERE IN GOVERNMENT - A VIRTUAL CENTRAL PANEL FOR DOL.

AS YOU RECOGNIZE IN YOUR LETTER REQUESTING MY APPEARANCE, MY VIEWS DO NOT REFLECT THE OFFICIAL VIEWS OF THE DEPARTMENT OF LABOR.

I AM HERE TODAY TO PRESENT TWO DISPARATE MATTERS: (1) THE OVERT ABUSE OF THE INDEPENDENCE OF ADMINISTRATIVE LAW JUDGES AT MANY AGENCIES OVER THE YEARS AND THE NEED FOR REMOVAL OF JUDGES FROM AGENCY CONTROL, AND (2) THE INEFFICIENCY OF THE CURRENT SYSTEM WHEREBY LARGE BACKLOGS APPEAR AT SOME AGENCIES WHILE OTHERS ARE LITERALLY WITHOUT WORK. MY TESTIMONY IS BOTH STATISTICAL AND ANECDOTAL. THE OVERWHELMING PROOF IS THAT NOT PASSING THIS BILL WOULD BE AGAINST THE PUBLIC INTEREST AND, GIVEN THE BUDGET CONSIDERATIONS, THAT PASSAGE IS ABSOLUTELY NECESSARY FOR MORE COST-EFFICIENT DELIVERY OF ADJUDICATION SERVICES. I ENCOURAGE THIS COMMITTEE TO LOOK AT AGENCY RESPONSES OPPOSING THIS BILL AND THEIR APPROPRIATION SUBMISSIONS IN THE LIGHT OF THE ATTACHED ANALYSIS OF THEIR CURRENT WORKLOADS.

The most egregious assault upon the independence of judges has been at the Social Security Administration. The SSA judges filed suit. They won that action, the U. S. District Court Judge finding that improper influence had been exerted by the SSA. Hundreds of thousands of citizens, your constituents, were affected. It should not be assumed automatically that the SSA people charged with budget responsibility were not well intentioned, but the result was a gross violation of the basic elements of fairness promised by the Administrative Procedure Act and an assault on the independence of judges. The Social Security judges spent almost $1,000,000 on legal fees to protect the public and to assert their independence as provided by the APA. These are facts. These facts cry out for reform, if, for no other reason to prevent a reccurence. At other agencies the abuses are no less onerous although the affected number of citizens directly affected might be less.

The savings which could be accomplished are significant. The current situation is unsupportable and the waste of resources has been up to $30 - 40,000,000 annually in the last couple of years.

My testimony is divided into two parts which address both subject matters.

ABUSE OF INDEPENDENCE

One of the most troublesome areas impacting upon this relationship has been the direct and improper influences exerted by agencies over their administrative law judges. These continual and pervasive influences have involved roughly 850 of the 1100 judges in the system.

Social Security Administration

The most blatant example of improper influence is found at the Social Security Administration (SSA). The SSA developed a program to implement Section 304 of the Social Security Disability Amendments of 1980, the "Bellmon Amendment." The program subjected judges to continual review of all decisions granting benefits, if their grant rate exceeded an arbitrary level set by the agency. SSA justified its program of Bellmon review on the ground that it was trying to improve the quality and accuracy of its judges' decisions. However, it clearly pressured its judges to be less generous when considering claims for benefits. In fact, the architect of the system in which Bellmon review was instituted was eligible for a bonus under a reward system for managers who achieve previously stated goals. In his case, his goal was not only to insure productivity, but to reduce the number of cases awarding benefits.

The program ultimately found its way into the federal courts when it was challenged by the judges at SSA as violative of their right to decisional independence under the Administrative Procedure Act. In 1984 a United States District judge found that improper influence had indeed been exerted by SSA over its judges. [1] The Court found that SSA had created a tense and unfair atmosphere impacting upon the decisional independence of the judges: Injunctive relief sought by the judges was denied because SSA had modified its program of review of judges' decisions, but the case highlights the inherent conflict that exists when an agency charged with budgetary considerations has influence over those charged with making purportedly independent decisions.

In the context of Social Security caseloads, it is understood that on the average each judge denied benefits in 3 more cases each month in FY 1983 than had been denied in FY 1981, resulting by arithmetical calculation alone in about 25,000 claimants' cases annually being denied benefits in FY 1983 that otherwise might have been granted (3 x 800 judges x 11 months = 26,400). Assuming that each case was worth approximately $65,000 - $70,000 in FY 1983 dollars, this translates to a dimimution in

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[1] *Association of Administrative Law Judges, Inc. v. Heckler*, 594 F. Supp. 1132, 1143 (D.D.C. 1984).

MONEY TRANSFERRED TO CLAIMANTS OF ABOUT $1.75 BILLION ANNUALLY (26,500 x $65,000 = $1,750,000,000) FOR EACH FULL YEAR THAT THE CHANGE OCCURRED. THE IMPLICIT LINK BETWEEN THE PROGRAM OF BELLMON REVIEW AND THE INCREASE IN DENIAL OF BENEFITS IS UNDENIABLE. THE COURT SO FOUND.

IT MAY BE THAT JUDGES, IN FACT, WERE GRANTING TOO MANY CLAIMS AND THAT CERTAIN JUDGES WERE SO CALLED "BLEEDING HEARTS," EVEN UNDER A REMEDIAL STATUTE DESIGNED TO ENSURE DISABILITY SUPPORT FOR DISABLED WORKERS. BUT IF THIS WERE THE CASE, ENABLING A PARTY TO THE CLAIM, ESPECIALLY THE ULTIMATE DECISION MAKER ON REVIEW, TO INFLUENCE WHETHER AN INDIVIDUAL CLAIM SHOULD BE GRANTED OR DENIED ON THE BASIS OF FACTUAL DETERMINATIONS AT THE TRIAL LEVEL IS CERTAINLY NOT WHAT THE APA ENVISAGED. IT IS CERTAINLY NOT WHAT PARTIES CONSIDER FAIRNESS IN A CLAIM AGAINST THEIR GOVERNMENT. THE PRESSURE, DIRECTED AGAINST 800 JUDGES, WAS CORROSIVE AND HAS RESULTED IN THE POSSIBILITY THAT THOUSANDS OF CITIZENS RECEIVED UNFAIR TREATMENT. IT IS LITTLE WONDER THAT ALMOST ALL STATES REFUSED IN ONE MANNER OR ANOTHER TO FOLLOW THESE DIRECTIONS, AND THAT THE CONGRESS ALMOST UNANIMOUSLY CHANGED THE GOVERNING STATUTE. IT IS ALSO LITTLE WONDER THAT THE AMERICAN MEDICAL ASSOCIATION AND THE AMERICAN ASSOCIATION OF RETIRED PEOPLE, WITH ITS 17 MILLION MEMBERS, SUPPORT THE CENTRAL PANEL PROPOSAL.

IT SHOULD ALSO BE NOTED THAT ATTEMPTS TO EXERT IMPROPER INFLUENCE OVER JUDGES MAY NOT HAVE ENDED AT SSA WHEN THE BELLMON REVIEW SYSTEM WAS MODIFIED.

FEDERAL TRADE COMMISSION

THE FEDERAL TRADE COMMISSION (FTC) HAS EXPERIENCED SEVERAL INCIDENTS INVOLVING IMPORTANT CASES WHERE THE AGENCY EITHER ATTEMPTED TO DIRECTLY INFLUENCE A PROCEEDING OR THE INFERENCE COULD BE DRAWN THAT IT HAD.

A. IN THE KELLOG CASE THE AGENCY, AS DISPLAYED AT SENATE OVERSIGHT HEARINGS, ENTERED INTO A CONTRACT ARRANGEMENT WITH A

RETIRED JUDGE FOR CONTINUED EMPLOYMENT - A JUDGE WHO ALLEGEDLY HAD A HISTORY OF MAKING RULINGS FAVORABLE TO THE AGENCY. THIS JUDGE HAD HEARD A SEVERAL YEAR PORTION OF A CASE AND RETIRED AND, RATHER THAN APPOINT ANOTHER JUDGE TO THE CASE, THE AGENCY ENTERED INTO A $50,000 A YEAR CONTRACT WITH HIM TO FINISH THE PROCEEDING. FOR SOME REASON, THE DEFENDANT DID NOT BELIEVE THAT A JUDGE WHOSE CONTRACT COULD BE TERMINATED BY THE PROSECUTING AUTHORITY POSSESSED THE REQUISITE DEGREE OF INDEPENDENCE.

THE CONGRESSIONAL HEARINGS INTO THE KELLOG CASE ALSO REVEALED THAT THE FTC HAD MANAGED TO APPOINT, THROUGH THE USE OF SELECTIVE CERTIFICATION, ITS OWN PROSECUTING ATTORNEYS TO POSITIONS OF ADMINISTRATIVE LAW JUDGES IN ALL BUT ONE INSTANCE. NOT ONLY DID THE AGENCY BRING ITS OWN UMPIRES TO THE BALLGAME AS SENATOR HEFLIN CALLS IT, BUT IT BROUGHT UMPIRES WHOSE BIAS COULD BE INFERRED.

IN THE SO-CALLED "KID VID" CASE THE CHAIRMAN OF THE FTC SOUGHT TO HAVE A SPECIFIC JUDGE APPOINTED WHO HE BELIEVED WAS BOTH FAMILIAR AND SYMPATHETIC TO THE CHAIRMAN'S VIEWS OF THE CASE. THE PARTICULAR JUDGE WAS DEMONSTRABLY KNOWLEDGABLE - HE HAD AIDED IN DRAFTING THE COMPLAINT AS AN FTC STAFF ATTORNEY BEFORE BEING APPOINTED A JUDGE. WHILE THE PROCEDURE WAS LEGAL UNDER THE GUISE OF RULEMAKING, THE CHARACTERIZATION OF THAT JUDGE AS A NEUTRAL DECISION MAKER IS STRAINED AT BEST.

FEDERAL LABOR RELATIONS AUTHORITY

THE FEDERAL LABOR RELATIONS AUTHORITY (FLRA) SERVES AS THE LABOR RELATIONS BOARD FOR FEDERAL EMPLOYEES. IN ONE PROCEEDING BEFORE THE FLRA, AIR TRAFFIC CONTROLLERS CONTENDED THAT THEY HAD BEEN IMPROPERLY REMOVED. THE CHAIRMAN OF THE AGENCY, OVER LUNCH, ALLEGEDLY REQUESTED THE CHIEF JUDGE OF FLRA TO TAKE THE CASE HIMSELF. THIS ACTION NOT ONLY REMOVED ANY SEMBLANCE OF INSULATION FROM THE JUDGE TRYING THE CASE, BUT PLACED THE ONE JUDGE WITH MANAGEMENT RESPONSIBILITIES AND "UNDERSTANDING" OF THE CHAIRMAN'S NEEDS IN THE POSITION OF BEING THE TRIER OF

FACT. BASED ON THESE ALLEGATIONS, WHEN THE CASE WAS APPEALED TO THE CIRCUIT COURT OF APPEALS, IT WAS TRANSFERRED TO A MASTER (AN ADMINISTRATIVE LAW JUDGE AT A DIFFERENT AGENCY) WHO, AFTER A HEARING, FOUND THESE TO BE THE FACTS. HOWEVER, A SPECIFIC FINDING OF IMPROPER INFLUENCE WAS UNNECESSARY SINCE THE PUBLIC PERCEPTION OF THE FAIRNESS OF THE PROCESS HAD ALREADY RECEIVED A MORTAL WOUND EVEN BEFORE THE EX PARTE COMMUNICATIONS WERE REVEALED. THE CHIEF JUDGE HAD ISSUED AND SERVED HIS PREVIOUSLY WRITTEN AND DUPLICATED DECISION WITHIN AN HOUR OR TWO OF RECEIVING CLOSING BRIEFS FROM THE PARTIES.

DEPARTMENT OF INTERIOR

A. IN THE 1970'S A PROCEEDING CAME BEFORE AN ADMINISTRATIVE LAW JUDGE WHICH WAS RELATED TO A U. S. DISTRICT COURT CASE. IN THE COURT CASE THE DEPARTMENT HAD ENTERED INTO AN INFORMAL AGREEMENT WITH THE DISTRICT COURT JUDGE NOT TO ISSUE ADMINISTRATIVE DECISIONS IN CASES RELATED TO THE COURT PROCEEDING. THE JUDGE DID NOT CONSIDER HIMSELF BOUND BY THE AGREEMENT ALTHOUGH THE ALMOST UNIVERSAL UNDERSTANDING HAS BEEN THAT SUCH AGREEMENTS ARE NEVER BREACHED. THERE IS NO QUESTION, HOWEVER, THAT THE AGENCY WAS NOT ENJOINED. THE JUDGE ISSUED A DECISION AND AS A CONSEQUENCE AN UNDERSECRETARY OF INTERIOR FORMALLY REPRIMANDED THE JUDGE. THE REPRIMAND WAS RESCINDED ONLY AFTER THE JUDGE HIRED COUNSEL AND ATTACKED THE PROCEDURE - AT SOME FINANCIAL COST EVEN THOUGH THE EXPENSE OF LITIGATION WAS ACCEPTED BY A PROFESSIONAL ASSOCIATION. A JUSTICE DEPARTMENT OPINION WAS ISSUED SUPPORTING THE JUDGE. IT OPINED THAT THE BASIS FOR A REPRIMAND DID NOT EXIST, BUT THE CRABBED OPINION REVEALED THAT THE JUSTICE DEPARTMENT VIEWED ADMINISTRATIVE LAW JUDGES AS JUST "OTHER EMPLOYEES". IT ALSO IMPLIED THAT THE AGENCY WAS NOT WITHOUT WEAPONS TO AFFECT THE JUDGE'S POSITION THROUGH STRATEGEMS LIKE MANIPULATING SUCH "PERKS" AS PARKING SPACES AND QUALITY OF OFFICE SPACE. THERE IS MORE THAN AMPLE EVIDENCE THAT THE JUSTICE

DEPARTMENT DOES NOT UNDERSTAND THE JUDICIAL INDEPENDENCE REQUIRED BY THE APA.

B. A 1984 OCCURRENCE AT INTERIOR INVOLVED A PROBLEM THAT ARISES WHEN A JUDGE'S OFFICE IS HOUSED IN AN OFFICE OF HEARINGS THAT IS NOT ADMINISTERED AS AN INDEPENDENT UNIT. THE HEAD OF THE OFFICE WAS A POLITICAL APPOINTEE, NOT ONLY CHARGED WITH HEARING CASES, BUT ALSO WITH PURSUING THE AGENCY'S AGENDA. HE COMMENCED A SERIES OF HARASSMENTS, APARENTLY TO FORCE THE JUDGE IN QUESTION TO RESIGN SO THAT HE COULD REPLACE HIM WITH HIS OWN CHOICE. AT ONE POINT, HE HAD ALL OF THE CASES ASSIGNED TO THIS WASHINGTON JUDGE, AND ALREADY SET FOR HEARING AT LOCATIONS SUCH AS PITTSBURGH, REASSIGNED TO A JUDGE IN SALT LAKE CITY. THE PLAN WAS APPARENTLY TO DECLARE THAT THE WASHINGTON JUDGE HAD NO WORK SO THAT THE POSITION COULD BE ABOLISHED.

ON ANOTHER OCCASION HE ISSUED A REPRIMAND LETTER, QUESTIONABLE TO SAY THE LEAST UNDER THE APA, BECAUSE THE JUDGE LEFT THE OFFICE EARLY TO HELP HIS DAUGHTER WHOSE CAR HAD BEEN IMPOUNDED. THE JUDGE HAD LEFT HIS OFFICE TO PICK HER UP AND RETRIEVE THE CAR AND HE WAS CHARGED WITH BEING ABSENT WITHOUT LEAVE. THE JUDGE WAS ALSO ISSUED A WARNING AGAINST FUTURE INFRACTIONS. REGARDLESS OF THE UNDERSTANDING, OR LACK THEREOF, BETWEEN THE PARTIES AS TO WHETHER THE JUDGE TOLD HIS SECRETARY WHEN HE WOULD BE BACK, THE CHILLING EFFECT OF ATTEMPTING TO ISSUE A REPRIMAND AGAINST A JUDGE UNDER THESE CIRCUMSTANCES IS UNMISTAKABLE. COUPLED WITH OTHER SUBSTANTIAL AND PETTY HARASSMENTS, IT REPRESENTS BALD INTERFERENCE WITH THE JUDGE'S INDEPENDENCE.

FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION

ANOTHER EXAMPLE HIGHLIGHTING THE PROBLEMS ATTENDANT IN THE PRACTICE OF HAVING JUDGES SUBJECT TO AGENCY PROCESSESS WHEN A DISPUTE ARISES OVER A JUDGE'S ACTIVITIES MAY BE SEEN AT THE FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION (FMSHRC). IN A SERIES OF CURRENTLY PENDING CASES, THE FMSHRC HAS JOINED BATTLE

WITH ONE OF ITS JUDGES CONCERNING THE PROPRIETY OF HIS ACTIONS. SPECIFICALLY, THERE HAD BEEN ACCUSATION'S OF EX PARTE COMMUNICATIONS, HARASSMENT OF ATTORNEYS BY THE JUDGE, AND CONDUCT INCONSISTENT WITH HIS ROLE AS A JUDGE. THE AGENCY ISSUED AN ORDER, AFTER AN INVESTIGATION OF ALLEGATIONS, FINDING THAT THE JUDGE HAD ENGAGED IN IMPROPER ACTIVITIES, WHICH THE AFFECTED JUDGE HAS VIEWED AS UNFAIR PRESSURE. REGARDLESS OF WHETHER THE AGENCY PROCEDURE WAS CORRECT IN ISSUING AN ORDER AFTER INVESTIGATION, IT SHOWS THAT NO AGENCY PROCEDURES ARE SUITED TO THE RESOLUTION OF THIS TYPE OF DISPUTE IN THAT THE POTENTIAL FOR ABUSE BY EITHER THE JUDGE OR THE AGENCY CLEARLY EXISTS.

COAST GUARD

THE CHIEF JUDGE AT THE COAST GUARD CURRENTLY DRAFTS, OR REVIEWS FOR THE COMMANDANT, ALL DECISIONS OF HIS OWN JUDGES ON APPEAL. IT IS BELIEVED THAT THE PARTIES ARE UNAWARE OF THIS PRACTICE. THE IMPLICATIONS REGARDING THE PROPRIETY OF THIS PROCEDURE, EVEN IF NOT IN VIOLATION OF REGULATION OR STATUTE, SPEAK FOR THEMSELVES.

ENVIRONMENTAL PROTECTION AGENCY

IN DECEMBER 1984, THE CHIEF JUDGE OF THIS AGENCY APPEARS TO HAVE OPENLY BEGUN A CAMPAIGN TO HARASS A WOMAN JUDGE AND, AMONG OTHER THINGS, HAS REFUSED TO PERMIT HER TO ENGAGE ADMINISTRATIVELY IN PROFESSIONAL ASSOCIATION ACTIVITIES OR THOSE OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES - DESPITE THE FACT THAT THE GOVERNMENT OFFICIALLY ENCOURAGES BOTH. HARASSMENT HAS EXTENDED TO THE USE OF THE OFFICE OF THE INSPECTOR GENERAL AT EPA TO INVESTIGATE SUCH HEINOUS CRIMES AS RECEIPT OR RESPONSE TO MAIL OF PROFESSIONAL ASSOCIATIONS, USING THE OFFICE TELEPHONE FOR PROFESSIONAL ASSOCIATION ACTIVITIES, OR ATTENDING OFFICIAL MEETINGS. 2/ AVENUES OF

2/ THE HARASSMENT EXTENDED TO REVIEWING SEVEN YEAR OLD DOCUMENTS, INCLUDING TRAVEL VOUCHERS FOR THE PAST FIVE YEARS WHICH HAD BEEN REVIEWED AND APPROVED BY THE SAME CHIEF JUDGE.

HARASSMENT INCLUDE UNDULY AND IMPROPERLY WITHHOLDING TRAVEL PAYMENTS, INTERFERING WITH DETERMINATIONS OF TRAVEL NEEDS FOR CASE HEARINGS, PROBABLE IMPROPER ROTATION OF CASES, AND DISCRIMINATING IN CONSIDERATION OF APPLICATIONS FOR LEAVE AND DISCRIMINATORY APPLICATION OF LEAVE POLICY. WHILE THERE IS NO PROOF OF DIRECT AGENCY COMPLICITY, AT LEAST AT THIS TIME, THERE IS ENOUGH MATERIAL TO CONCLUDE THAT THE AGENCY WAS BOTH KNOWLEDGEABLE OF THE HARASSMENT AND, IF NOT GUILTY OF COMMISSION, WAS GUILTY OF OMMISSION IN FAILING TO PREVENT THE CONTINUED HARASSMENT WHILE INVESTIGATING FALSE ALLEGATIONS WHICH WOULD HAVE BEEN DISMISSED ALMOST OUT OF HAND AT OTHER AGENCIES. 3/ THE HARASSMENT APPARENTLY EVEN EXTENDED TO THE JUDGE'S SECRETARY. IF I WERE A PARTY TO A PROCEEDING AGAINST THE AGENCY, NO MATTER HOW FAIR THE JUDGE BEING HARASSED APPEARED, I WOULD BE CONCERNED AS TO WHETHER I WOULD RECEIVE A FAIR HEARING UNDER CIRCUMSTANCES SUCH AS THESE.4/

THESE EXAMPLES ARE SPREAD OUT OVER SEVEN AGENCIES. DIRECT AND OBTUSE, IF NOT CLEARLY IMPROPER OCCURRENCES, ARE, AND HAVE BEEN, RAMPANT. IT IS NOT SURPRIZING THAT BOTH AGENCIES AND JUDGES SEEK TO ISOLATE THESE PROBLEMS AS BEING PRESENT ONLY AT SOCIAL SECURITY. AT EPA, HOWEVER, THESE ABERATIONS CAN AFFECT THE ENVIRONMENT AND AT SOCIAL SECURITY THE "ANOMALY" DIRECTLY AFFECTED 25,000 PEOPLE A YEAR UNTIL THE COURTS AND THE CONGRESS STEPPED IN TO REMEDY THE SITUATION.

SAVINGS

ANOTHER STRONG ARGUMENT IN FAVOR OF A CENTRAL PANEL IS THAT IT WOULD REDUCE WASTE BY ALLOWING A MORE STREAMLINED

3/ THE QUESTIONING OF THE LEGITIMACY OF AN $.88 LONG DISTANCE TELEPHONE CALL ON A FOUR YEAR OLD TRAVEL VOUCHER WOULD BE DEEMED HARASSMENT BY THIS OBSERVER. MOVING THE QUESTIONING TO AN INVESTIGATIVE LEVEL BY AN IG'S OFFICE WHEN IT IS COMMON KNOWLEDGE THAT A CHIEF JUDGE IS DELIBERATELY PRESSING ANOTHER JUDGE ON THESE TYPES OF ISSUES RAISES SERIOUS QUESTIONS REGARDING THE INTEGRITY OF THE SYSTEM.

4/ MOREOVER, THE PROBABLE FAILURE TO ROTATE CASES WHERE PRACTICABLE, COULD FORM A DEFENSE FROM ANY SERIOUS ATTEMPT OF THE AGENCY TO ENFORCE A DECISION OR ORDER ISSUED IN AN ADMINISTRATIVE PROCEEDING.

PROCEDURE FOR SHIFTING JUDGES FROM AREAS WITH LIMITED CASELOADS TO AREAS WITH SUBSTANTIAL BACKLOGS. AN EXAMINATION OF THE DISPOSITION OF CASES AFTER TRIAL AT FIVE AGENCIES IS SET OUT BELOW. WHILE MORE DETAILED INFORMATION ON EACH OF THE FIVE AGENCIES USED AS EXAMPLES IS AVAILABLE, THE SYNOPSIS REVEALS THAT THE JUDGES AT EACH AGENCY ARE ONLY PARTIALLY UTILIZED - REACHING LEVELS OF UP TO 50% OR MORE AT SEVERAL AGENCIES .

DOL WAS ABLE TO BORROW JUDGES ONLY AFTER PRESSURE WAS PLACED AT HIGH EXECUTIVE LEVELS AND THE SENATE APPROPRIATION COMMITTEE DISPLAYED AN INTEREST. EFFECTIVELY, AGENCIES REFUSE TO LOAN JUDGES EXCEPT INDIVIDUAL DISCRETE CASES, MOST OF WHICH SETTLE. WHEN AN AGENCY LIKE DOL SEEKS HELP, IT IS BASICALLY STONEWALLED, OR SO OVERCHARGED THAT THE RESPONSE IS TANTAMOUNT TO A REFUSAL. SSA CHARGES A JUDGE'S SALARY, PLUS 113%, AND WANTS 50% OF ITS MONEY UP FRONT. SUPPORT STAFF IS FULLY BILLED BY SSA AND THE ESTIMATED COST PER DISPOSING OF A CASE WOULD BE 2-3 TIMES THE IN-HOUSE COST TO DOL. THE LOAN PROGRAM SIMPLY DOES NOT WORK.

1. FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

ACCORDING TO ITS OWN FIGURES, IN FY 1985 THE ADMINISTRATIVE LAW JUDGES AT FMS&HRC DISPOSED OF 299 CASES AFTER HEARING. HOWEVER AN EXAMINATION OF THE JUDGES' DECISIONS PUBLISHED MONTHLY BY THE COMMISSION SHOWS THAT THIS FIGURE IS SOMEWHAT MISLEADING.[5]

ONLY 151 JUDGES' DECISIONS WERE ACTUALLY ISSUED DURING FY 1985. THE DIFFERENCE BETWEEN THE NUMBER OF CASES DISPOSED OF AND THE NUMBER OF DECISIONS ISSUED IS ATTRIBUTABLE TO THE FACT THAT MANY DECISIONS DISPOSE OF MORE THAN ONE CASE OR DOCKET NUMBER. DURING FY 1985 A TOTAL OF 18 DECISIONS WERE

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[5] THIS SURVEY OF VOLUMES OF FMS&HRC DECISIONS ATTEMPTED TO LIMIT ITS SCOPE TO DECISIONS MADE AFTER A HEARING. DECISIONS BASED SOLEY ON THE RECORD WERE ALSO INCLUDED IN THE SURVEY, AS WERE CASES SETTLED AT HEARING AND DECISIONS ON REMAND. ALTHOUGH IT IS NOT CERTAIN THAT THE 299 FY 1985 DECISIONS SURVEYED IN THE VOLUMES ARE THE SAME 299 REPORTED BY THE COMMISSION, THE MARGIN OF ERROR IS PROBABLY SMALL.

ISSUED WHICH DISPOSED OF 3 OR MORE DOCKET NUMBERS. ONE DECISION REPRESENTED 24 DOCKET NUMBERS AND TWO DECISIONS DISPOSED OF 18 CASES EACH. WHILE THIS PRACTICE IS CERTAINLY IN THE INTEREST OF JUDICIAL ECONOMY, THE FIGURE OF 299 DECISIONS AFTER HEARING SOMEWHAT DISTORTS THE ACTUAL NUMBER OF DECISIONS ISSUED.

THE COMMISSION REPORTS THAT IT HAD AN AVERAGE OF 11.75 JUDGES AVAILABLE FOR FY 1985. THEREFORE, AN AVERAGE OF 12.85 DECISIONS AFTER HEARING WERE ISSUED BY EACH JUDGE. [6/] MOREOVER, 19 OF THE 151 DECISIONS REPRESENT PROCEEDINGS THAT WERE SETTLED IMMEDIATELY PRIOR TO HEARING, AT DOCKET CALL, OR AT THE CONCLUSION OF THE HEARING, THEREBY OBVIATING THE NEED FOR ANYTHING MORE THAN THE JUDGES' APPROVAL OF THE SETTLEMENT. AS THE APPENDIX SHOWS, EIGHT JUDGES DISPOSED OF LESS THAN 1 CASE A MONTH AFTER TRIAL.

THE BEST AVAILABLE INFORMATION INDICATES THAT APPROXIMATELY THE SAME RESULTS WILL OCCUR IN FY 1986. DURING THE FIRST FIVE MONTHS OF THE YEAR, 73 DECISIONS AFTER HEARING OR ON REMAND CLOSED 101 DOCKET NUMBERS. NINE OF THESE DECISIONS WERE SETTLED AT HEARING OR WERE SETTLEMENTS APPROVED AT HEARING.

2. OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

A SURVEY WAS CONDUCTED OF DECISIONS ISSUED AFTER HEARING BY THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION. OSHRC DECISIONS ARE NOT PUBLISHED IN VOLUMES AS IS THE PRACTICE AT FMSHRC SO, UPON REQUEST, OSHRC PERSONNEL REMOVED DECISIONS RENDERED AFTER HEARINGS FROM THE FILES FOR EXAMINATION AND IT IS ASSUMED THEY DID PRESENT ALL SUCH DECISIONS. SETTLEMENTS, DISMISSALS AND SUMMARY DECISIONS WERE NOT EXAMINED. A REVIEW OF THESE PUBLIC DOCUMENTS INDICATES THAT THE AVERAGE CASE LASTED APPROXIMATELY ONE DAY AT TRIAL. THE DECISIONS ISSUED IN SUCH A CASE WAS BETWEEN 5 AND 7 PAGES IN LENGTH.

[6/] A TOTAL OF 70 OF THE 151 DECISIONS APPEAR TO HAVE BEEN ISSUED BY ONLY 3 JUDGES.

The survey showed that 132 decisions after hearing were issued during FY 1985. 7/ A casual examination of the decisions revealed that the average and mean length of decisions were about 5-7 pages, with a hearing length of approximately one day. There appear to have been approximately 20 judges' at OSHRC during this period and, therefore, the average number of full decisions issued is below 10 per judge per year (see appendix). Of course, the average is somewhat deceiving because some judges are more prolific than others. 8/

During the first 5 months of FY 1986 a total of 55 decisions after hearing were issued. Thus the 1986 figures may be similar to the 1985 results. It is difficult to understand how OSHRC justified appointing a new judge in Denver at the beginning of FY 1986.

3. Federal Labor Relations Authority

The Federal Labor Relations Authority (FLRA) was established in 1978 by the Civil Service Reform Act to serve as the "Labor Relations Board" for government workers. Currently, the average disposition per judge is 14 cases per annum (See appendix). . Cases average a day or two at trial and represent, for the most part, an equivalent to the easiest component of the workload at the NLRB.

Furthermore, it appears that the majority of FLRA's case dispositions occur as the result of settlement agreements and not hearings. Available information indicates that during the first five months of FY 1986 approximately 223 cases were disposed of. However only 35 of these dispositions represent decisions after trial, and due to consolidation of hearings, only 33 hearings were actually held in these 35 cases .

7/ This figure does not reflect consolidated decisions disposing of more than one docket number. OSHRC reported that it disposed of 164 cases in FY 1985. However, the 132 decisions surveyed only represented 140 docket numbers.

8/ During FY 1985, five ALJ's rendered 58 of the 132 decisions after hearing.

Over the past several years, the FLRA has consistently over estimated its caseload. A compilation of the estimated number of case depositions after hearing and the actual number disposed of is as follows:

	Estimated	Actual
FY 1983	-	169
FY 1984	182	152
FY 1985	154[9]	162
FY 1986	145	35
FY 1987	136	-

In FY 1985 the FLRA initially estimated that it would depose of 191 cases after trial. However, in its budget submission for FY 1986, FLRA indicated that it actually disposed of 162 cases after hearing, and a survey of its docket only indicated 137 such decisions. This figure reflects a significant decline from the "actual" FY 1985 number.

4. National Labor Relations Board

Dispositions of cases after trial at the NLRB Judges' office for the first 5 months in each of the last 5 fiscal years (October - February) discloses:

FY 1982	398
FY 1983	394
FY 1984	383
FY 1985	308
FY 1986	252[10]

During FY 1982 - 1984 the NLRB judges' offices had about 2,000 pending cases. The best information available today suggests that there are only 800 cases in shop. The settlement rate of cases referred by the General Counsel's office is better than 90%, and the prospects of increased cases in FY 1986 and FY 1987 seems limited.

9/ The FY 1985 request estimate was 191 cases. In the subsequent FY 1986 budget this dropped to 154 cases with no apparent staffing or dollar reduction. Surprisingly, this figure turned out to be almost the actual number of dispositions shown in the 1986 budget.

10/ FY 1986: October 42; November 51; December 71; January 38; February 59.

There are currently 100 judges at the NLRB. In 1981, as a result of a critical GAO report on productivity, the NLRB indicated that the minimum average number of cases after trial per judge that was acceptable was 12 cases per judge. The following annual disposition levels, assuming 100 judges on staff, discloses average disposition levels as follows:

FY 1984	10.6
FY 1985	7.6
FY 1986	6.0 (projected)

Thus, the projected FY 1986 productivity level is one-half the so-called irreducible minimum average stated in FY 1981 as the NLRB "minimum" standard. It is assumed that 12 cases per annum was the smallest number the NLRB believed it could use even though this "standard" is probably grossly understated. The NLRB has few secretaries and no law clerks: a good law clerk can double the output of a judge on routine type cases and most of the NLRB cases are routine.

The current case filings are probably mostly Section 8(a)(3) cases, which are charges of unfair discharge of an employee. It is estimated that these cases, turning almost entirely on resolution of factual issues, take a day or two at trial and should not take more than a week to prepare and issue a decision. The NLRB now admits keeping records of cases filed by case type, but this information was not available through open sources. An analysis of that data likely would give a more accurate picture of current workloads. If underutilized NLRB judges had been detailed to DOL in 1983-1985 there would have been few backlogs.

5. Social Security Administration

It is very difficult to determine what is the shortfall of available work for SSA judges. The reason is that it depends upon what productivity number one uses, a lower expected number gives a smaller percentage of underutilized judges. The FY

1985 statistics used by SSA are somewhat suspect because conversations with judges on the system indicate both a lower intake and disposition level than shown by official SSA figures. Thus whereas it appears that for much of FY 1984 and 1985 the intake of cases per judge per month was about 20 cases or less nationwide, SSA has used an average intake per judge per month of 28 cases.11/ Several months ago SSA stated that dispositions averaged 26 cases a month, but many judges suggested that this number was inflated and recent statistical material volunteered by the Chief Judge shows a disposition rate of 23 cases per judge per month (February) in FY 1986.

The claim has been made also that the cases have gotten harder by a factor of "15% - 25%." This is probably true to some extent at SSA where there is a new statutory standard in the disability factor, but is a suspicious claim since it is the claim automatically made by any agency when disposition levels fall - like the NLRB where there has been no change in the enabling statute. Last, SSA's current pending cases, about 90,000, is what is necessary to keep most offices even looking busy.

SSA's blueprint for disposition levels for FY 1984 was 45 cases a month per judge - a thoroughly unrealistic number even under the old statute if fairness and quality were criteria. If a standard of 35 cases a month is used, however, it would indicate that 1/3 of the 720 judge work force today is underutilized. If 30 is used, it would be 1/4, and if 30 is used with a maximum 25% acceptance of the claim "more difficult work", the underutilization factor is 8% - 10%. This translates to very large dollars since the budget figure for SSA judges gives a fully distributed cost of over $200,000 per judge ($150,000,000 ÷ 720), and the 8% (58 judges) equates to $11.6 million dollars for FY 1986. If the underutilization factor is

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11/ In the *Brennan* case the Merit System Protection Board commented on the unreliability of SSA statistics.

35% (i.e., 35 cases a month as a reasonable disposition level and 23 cases per month as the actual FY 1986 disposition level), the difference is $35,000,000 thie year. Probably a fair current figure lies somewhere between 25 cases and 30 cases a month as a reasonable disposition level, but, this observer cannot make this a precise projection. What he can do is question why 35 NLRB or OSHRC judges were not detailed from NLRB or OSHRC to SSA before SSA hired 35 new judges this March.

Thank you for inviting me to testify. I would be happy to answer any further questions the committee may have.

APPENDIX

CASE DISPOSITIONS

FMS&HRC	FY 1985	FY 1986 (1st Five Months)
Judge A	7	5
Judge B	29	11
Judge C	22	11
Judge D	19	17
Judge E *	2	2
Judge F	8	4
Judge G	17	13
Judge H	8	2
Judge I	9	2
Judge J	8	4
Judge K	12	2
Judge L *	9	0
Judge M *	1	0
	151	73

OSHRC		
Judge A	6	3
Judge B	11	6
Judge C	9	2
Judge D	11	4
Judge E *	4	0
Judge F	11	8
Judge G	7	2
Judge H	10	6
Judge I	6	2
Judge J	4	2
Judge K	5	0
Judge L	5	2
Judge M	15	2
Judge N	4	6
Judge O *	6	0
Judge P *	5	0
Judge Q	2	1
Judge R	3	1
Judge S	3	3
Judge T	5	4
	132	54

* Retired or transfered to or from another agengy during course of fiscal year.

FLRA

	FY 1985	FY 1986 (1st Five Months)
		No Figures
Judge A	11	
Judge B	16	
Judge C	16	
Judge D	18	
Judge E	5	
Judge F	8	
Judge G	18	
Judge H	12	
Judge I	12	
Judge J	10	
Judge K	11	
	137	

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

ADMINISTRATIVE LAW JUDGES

May 16, 1986

Honorable Charles E. Grassley
Chairman
Subcommittee on Administrative Practice
and Procedure
Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Grassley:

At the hearing held on May 13, 1986, before the Subcommittee On Administrative Practice and Procedure, Senate Committee On The Judiciary (Senator Howell T. Heflin, presiding), Nahum Litt, Chief Administrative Law Judge, Department of Labor, included within his prepared statement which was received into the record the following references to the Federal Trade Commission:

> The Federal Trade Commission (FTC) has experienced several incidents involving important cases where the agency either attempted to directly influence a proceeding or the inference could be drawn that it had.
>
> In the Kellog case the agency, as displayed at Senate oversight hearings, entered into a contract arrangement with a retired judge for continued employment - a judge who allegedly had a history of making rulings favorable to the agency. This judge had heard a several year portion of a case and retired and, rather than appoint another judge to the case, the agency entered into a $50,000 a year contract with him to finish the proceeding. For some reason, the defendant did not believe that a judge whose contract could be terminated by the prosecuting authority possessed the requisite degree of independence.
>
> The Congressional hearings into the Kellog case also revealed that the FTC had managed to appoint, through the use of selective certification, its own prosecuting attorneys to positions of administrative law judges in all but one instance. Not only did the agency bring its own umpires to the ballgame as Senator Heflin calls it, but it brought umpires whose bias could be inferred.
>
> In the so-called "Kid Vid" case the Chairman of the FTC sought to have a specific judge appointed who he believed was both familiar and sympathetic to the Chairman's views of the case. The particular judge was demonstrably knowledgable - he had aided in drafting the complaint as an FTC staff Attorney before being appointed a judge. While the procedure was legal under the guise of rulemaking, the characterization of that judge as a neutral decision maker is strained at best.

These allegations, and the inferences which Litt asks the Subcommittee to draw from them, cannot go unanswered.

The facts are that in Kellogg, Docket No. 8883, 99 F.T.C. 8 (1982), a complicated monopolization case, the trial had been going on for over six years, and a record consisting of approximately 32,000 pages of transcript and thousands of pages of documents had been compiled. About four to five weeks of trial work remained and a lengthy and difficult decision had to be written when Judge Hinkes made his decision to retire at age sixty-eight because of pressing personal problems. The parties to the proceeding, government and business, had expended several million dollars in the trial of the matter, and the then Chief Judge, Daniel H. Hanscom, was apprehensive over the prospect that the entire case would have to be retried if some arrangement were not made to persuade Judge Hinkes to complete the case, since the Administrative Procedure Act requires that the trier of facts who presides at the reception of the evidence must make the decision unless he becomes unavailable to the agency (5 U.S.C. 554(d)). Attempts were made by Judge Hanscom to persuade Judge Hinkes not to retire, including a request that he complete the proceeding as a rehired annuitant. These efforts were unsuccessful, and as a last resort Judge Hanscom recommended that Judge Hinkes be offered a contract to complete the matter. While it is true that the proposed contract with Judge Hinkes had a provision that the agreement could be terminated for the convenience of the government, it should be noted that such a clause is automatically included in all government performance contracts. When the respondents, however, objected to the contract, the Commission had no other alternative but to find that Judge Hinkes had become unavailable to the agency within the meaning of 5 U.S.C. 554(d), and Judge Alvin Berman was appointed to complete the case.

In sum, the Commission's action in Kellogg was nothing more than an attempt to bring the proceeding to a prompt conclusion with the least expense to the parties and the public. Judge Hinkes announced on the record his impending retirement and his intention to continue presiding in the proceeding under a contract. The Commission's action in the Kellogg matter, -- *i.e.*, the proposed use of a contract -- was also publicly disclosed. There is no conceivable way that the Commission's action was designed to interfere with the independence of any administrative law judge; nor was it an attempt to influence the outcome of a proceeding while it was pending before any administrative law judge. Litt's innuendo to the contrary is grossly unfair.

While the Kellogg case did indeed present a real predicament for the Commission, it is significant that nowhere does Litt suggest how the problem would be handled any differently through the panacea of his "corps" proposal. Would Litt prohibit senior judges from retiring? Would Litt allow massive records to go down the drain without making some attempt to avoid waste? These were the difficult questions raised by the Kellogg case, and instead of addressing them Litt instead chose to malign the Commission.

As for Litt's characterization of Judge Hinkes as "a judge who allegedly had a history of making rulings favorable to the agency," this is irresponsible. Respondents' counsel in Kellogg who aggressively pursued every legitimate adverserial way to defeat the Commission's complaint never made such a charge. Judge Hinkes was never a Commission employee prior to becoming an administrative law judge. He had an extensive background in private practice before joining government service. His employment history as an administrative law judge began at the Office of Alien Property. He later transferred to the Commission as an administrative law judge but his position was eliminated during a reduction in the Commission's staff of administrative law judges. He then joined the National Labor Relations Board as an administrative law judge, and upon his application, was rehired by the Commission as an administrative law judge in 1972. Litt's innuendos serve only to besmirch the reputation of a now long-retired senior administrative law judge who gave many years of honorable federal service.

A further insinuation in Litt's remarks to the Subcommittee is the statement that the Commission has "managed to appoint, through the use of selective certification, its own prosecuting attorneys to positions of administrative law judges in all but one instance." It is true that all six present administrative law judges at the Commission have been employed as attorneys on the Commission's staff at one time or another. Three of these administrative law judges, however, transferred to the Commission after serving as administrative law judges at other agencies, -- Department of Labor, Drug Enforcement Agency, and the Social Security Administration. But the Commission does not use "selective certification" in hiring administrative law judges as that term is used by some agencies in hiring administrative law judges; i.e., National Labor Relations Board. The Commission, however, is selective in hiring administrative law judges in the sense that it attempts to employ judges who are knowledgeable in handling complex antitrust, trade regulation, and consumer fraud and deception cases. Certainly there is no reason why attorneys who have become experts in a certain aspect of the law should be denied an opportunity to continue to work in these areas if they so desire. As it happens, the reputation of the Commission as a training ground for excellent lawyers is well-known, to the point that FTC staff lawyers are not only sought after by the Commission itself as ALJs, but they have been recruited for ALJ positions by many agencies, including Litt's own Department of Labor.

The inference Litt attempts to draw from the fact that former staff lawyers have moved to the ALJ bench (just as many former U.S. Attorneys have become District Court judges), recklessly impugns the integrity of the entire staff of administrative law judges who have served at the Commission over the past years, and the Commissioners as well. The shallowness of Litt's statement ("not only did the agency bring its own umpires to the ballgame ... but it brought umpires whose bias could be inferred") is also revealed by the fact that Judge Hinkes, who, as I have indicated earlier, Litt accuses of having a history of ruling favorably for the agency, was never a Commission employee prior to becoming an administrative law judge. Litt's blanket condemnation of the Federal Trade Commission is not only unwarranted, but is destructive of the entire administrative process.

Litt's last allegation relates to the Commission's proposed trade regulation rule concerning advertising to children. This allegation has been answered fully by Administrative Law Judge Morton Needelman who was assigned to the matter. Attached is a copy of his letter to you dated May 14, 1986. I have known Judge Needelman for approximately twenty-five years, and he is well known to me and to all as a conscientious, hardworking, independent thinker of high integrity. I am confident that he handled the children's advertising matter in a highly competent, totally unbiased manner, contrary to Litt's innuendo.

Also attached is testimony given by Michael Pertschuk, at that time Chairman of the Federal Trade Commission, on September 4, 1980 before the Consumer Subcommittee of the Senate Committee on Commerce, Science and Transportation, on the administrative law judge system. In addition, I am enclosing testimony which I gave on September 5, 1980 before the same Subcommittee on the same subject matter. I request that this letter, with attachments, be made part of the record before the

Subcommittee in its consideration of S. 673, Legislation To Create An Administrative Law Judge Corps.

Sincerely,

Ernest G. Barnes

Ernest G. Barnes
Chief Administrative Law Judge

cc: Senator Howell T. Heflin (with enclosures)

Enclosures (3)

FEDERAL TRADE COMMISSION
WASHINGTON. D. C. 20580

ADMINISTRATIVE LAW JUDGES

May 14, 1986

Honorable Charles E. Grassley
Chairman
Subcommittee on Administrative Practice and Procedure
Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Grassley:

Appearing before your Subcommittee on May 13, 1986, Nahum Litt, Chief Administrative Law Judge of the Department of Labor, made the following statement at page 8 of his prepared testimony:

> In the so-called "Kid Vid" case the Chairman of the FTC sought to have a specific judge appointed who he believed was both familiar and sympathetic to the Chairman's views of the case. The particular judge was demonstrably knowledgable - he had aided in drafting the complaint as an FTC staff attorney before being appointed a judge. While the procedure was legal under the guise of rulemaking, the characterization of that judge as a neutral decision maker is strained at best.

As the unnamed "specific judge" cited in Litt's testimony, I believe that you may wish to be informed of the following facts which, of course, could easily have been determined by Litt through the simple expedient of a phone call to anyone familiar with the proceeding mentioned in his remarks.

To begin with, Kid Vid was not an adjudicative "case" initiated by a "complaint." It was a rulemaking proceeding, captioned In the Matter of Children's Advertising, TRR No. 215-60, 43 Fed. Reg. 17967 (1978). More importantly, not only had I not "aided" in drafting the nonexistent complaint as an FTC attorney before being appointed an administrative law judge, but as a member of the FTC staff I had had no connection whatsoever with children's advertising in any form, adjudicative or rulemaking. My experience as an FTC staff member was mainly as an antitrust litigator, attorney-advisor to Commissioners and Chairmen, and as an assistant director involved with such matters as funeral practices, credit abuse, and inner city hard core fraud.

As it happens, my appointment as presiding officer for the Kid Vid proceeding in 1978 was made some four years after I had left the FTC staff to become an administrative law judge. At that time (i.e., 1978) under existing law and Commission rules it was perfectly proper for the Commission to designate a member of its staff as a presiding officer for rulemaking purposes. In an excess of caution perhaps, the Commission decided that notwithstanding its right to appoint a presiding officer from the staff, it wanted an independent administrative law judge to handle the proceeding because of the extreme importance and controversy surrounding the project. At no time did the Chairman or any Commissioner attempt to determine whether I was familiar or sympathetic with anyone's views on children's advertising. To the contrary, before being selected for the post, I told the Chairman that I had had no prior involvement with children's advertising, and I assured him that I could be objective about all issues of fact and law that might arise in the rulemaking proceeding. The only condition imposed before I accepted the assignment was imposed by me, not the Chairman, namely, that the Office of Administrative Law Judges of the OPM would have to be asked whether it was permissible for an administrative law judge to perform a rulemaking function. This check was made, and the Commission was informed that such an assignment was permissible since it was not inconsistent with the duties of an administrative law judge.

As for how I carried out those duties and whether or not I was a "neutral decision maker," you may want to consider the following unsolicited comments (all made at the time of the hearings) from industry sources who were vehemently opposed to the Commission's proposed rule —

Fletcher C. Waller, Jr., Vice President and Director of Marketing Services for General Mills, Inc., testified:

> Mr. Needelman, I approached these hearings — I have been involved in this issue, as I said, for 10 years — I approached these hearings with a great deal of hesitation and anxiety. I am personally overwhelmed at the case and the consideration that you are showing, and at the backgrounding that you have obviously done. You have done your homework remarkably. I am very pleased. I hope you set this as a model for such hearings all the way through. You are very even-handed, and you're asking tough, probing, essential questions. (Tr. 632.)

Frederick P. Furth, counsel for the Kellogg Company, said:

> You face some very difficult issues. I should say admirably in a lot of your cross-examination, it has been quite admirable. It has been a lot better than what I think I could do. I am very surprised. I think everybody from the industry has been pleased by that. You have been difficult on both sides. (Tr. 6320.)

The following came from Aaron Locker, counsel for the Toy Manufacturers Association:

> I think in San Francisco you made a statement that your primary purpose in these proceedings was to insure the compilation of as full and complete a record as possible. I think you have been doing a good job in that respect. I have indicated that privately in San Francisco, or at least semiprivately. I take this opportunity to reiterate it publicly. (Tr. 5138-39.)

Dr. Fredrick J. Stare of Harvard University, a consultant to the Kellogg Company and the Cereal Institute, wrote:

> While I only attended a portion of the hearings the afternoon of March 12, I thought your conduct of the meeting was exemplary and I had heard the same opinion voiced by others who had attended many of the sessions. (Letter to Morton Needelman, 3-16-79.)

On March 12, 1979, Broadcasting, an industry publication, which was hardly a supporter of the Commission's proposed rule, gave this assessment of my performance:

> Mr. Needelman is a tough questioner. He has disregarded time limits and has exhausted an extensive list of questions with each witness, never settling for an answer that does not satisfy him. He appears equipped to tackle all phases of the inquiry — everything from media buying practices to pH levels on teeth after consumption of various foods. He is obviously familiar with material submitted previously by those testifying, referring often to specific points witnesses have previously made.
>
> Witnesses say Mr. Needelman has remained fair. He has displayed no favoritism, but has grilled each witness in an evenhanded manner. He is in obvious control of the proceedings, oblivious, it seems, to the audience which dwindled as the week progressed.
>
> The proceedings have at times become exhausting: hour after hour of technical points raised and explored. Mr. Needelman's attention span, however, appears never to wane. He takes no break other than lunch, and remains seated between witnesses. He follows video presentations with a keen eye, asking at times for second, third or fourth showings of a particular presentation. (Broadcasting, 3-12-79 at 38-39.)

At the conclusion of the rulemaking hearings on March 30, 1979, counsel representing the industries which would be affected by the proposed rule as well as the government lawyers working on the rule moved that a resolution be incorporated into the record which read in pertinent part:

> ...you have earned the respect of representatives from all sides of this discussion for your balanced scrutiny of the matters brought before you. Congratulations!

Essentially, that is all there is to my role in the Kid Vid rulemaking, and I do not profess to understand the personal or political motives behind Litt's gratuitous attack on me. If I have ever met the man, certainly I have no lasting impression of such a meeting, and I have neither an involvement nor any interest, one way or the other, in the general subject matter of his testimony before your Subcommittee.

While I believe the facts cited above fully justify my feeling of utter outrage over what I regard as a libelous calumny, I leave it to you and your Subcommittee to determine whether Litt's testimony represents nothing less than a transparent attempt to mislead the Senate.

Sincerely,

Morton Needelman
Administrative Law Judge

cc: Senator Howell T. Heflin

PREPARED STATEMENT OF MICHAEL PERTSCHUK

Mr. Chairman and members of the Subcommittee, I am pleased to appear today to discuss the corps of Administrative Law Judges and its relationship to the administrative agencies. Because law judges play so central a role in effective agency decisionmaking, I think that the Subcommittee's initiative in taking a hard look at their relationship to their parent agencies is commendable.

I want to say at the outset that, in my view, the current system not only works, but works well. At the FTC today we have a corps of Administrative Law Judges who are competent, impartial, and independent. They perform their responsibilities wholly without agency interference. That is my experience, and I am certain that my predecessors at the FTC will confirm that conclusion. So, too, will my colleagues here today, with respect to their agencies.

The success of the present Administrative Law Judge system is, of course, no accident. When Congress enacted the Administrative Procedure Act in 1946, it carefully designed an adjudicatory process that has, as integral components, ALJ independence and impartiality. This is so from the very outset, the method of ALJ selection.

The Office of Personnel Management, not the individual agencies, undertakes ALJ recruitment and examination. OPM sets the standards, OPM does the screening, and OPM prepares the list of qualified applicants from which an agency seeking to hire an ALJ must choose.

Once hired, a law judge does not answer to the agency for his performance, as other employees do. While the Chief Administrative Law Judge monitors workload to assure acceptable productivity, no effort is ever made to direct one or another outcome to an ALJ's decision.

During the course of an adjudication, a law judge is insulated from any ex parte communication on the merits. He compiles the record at trial and makes rulings as he sees fit. At the FTC, the Commission does not involve itself at all in ALJ decisionmaking, except in the rare event when it grants interlocutory review of an ALJ order. The law judge's initial decision is likewise free of any interference from anyone. He calls the facts and the law exactly as he sees them.

At that point, if his decision is appealed, the Commission quite properly applies its own perspective to the evidence. That, after all, is a principal purpose for which a bipartisan body of experts was created by Congress. But though the Commission sometimes disagrees with the legal conclusions of a law judge, an analysis of Commission decisions will demonstrate the Commission's confidence in, and reliance upon, the evidence adduced under the ALJ's supervision. There is, in short, exactly the synergy of independent decisionmakers - the law judge who compiles the record and draws his conclusions from it, and the Commission that draws from its experience and collegiality its final view of the statutory enforcement entrusted to it - that Congress envisioned when it created the regulatory agencies. In my view this process produces far more effective decisionmaking than either an ALJ acting alone, or an ALJ acting in conjunction with some external body devoid of experience with the complexities of FTC law enforcement.

Yet I recognize that some observers are troubled about the current structure and procedures. They perceive that law judges are dependent upon their parent agencies and appear to be biased in favor of agency prosecutions. That view is not borne out by experience, but as is often the case, appearances must be dealt with, for they create a sort of reality all their own. I therefore would like to raise a couple of ideas that may merit further consideration.

First, on ALJ recruitment, I think it might be valuable if OPM were given the resources to widen its recruitment effort. Our concern at the FTC, as I'm sure is true at the other agencies, is to enjoy the services of well qualified law judges, able to handle the often complex cases that arise under our statutes. So long as that criterion is satisfied, we have no particular preference as to the background of law judges. If a greater proportion of our ALJs were recruited from private practice, rather than from the agency itself, that would be entirely acceptable, assuming that proficiency standards were maintained. The major difficulty, I believe, is the substantial gap in salary between private practitioners of the requisite experience and skill and ALJs. Nevertheless, OPM can perhaps seek ways to broaden its recruitment efforts.

Second, the idea of assigning administrative responsibility for ALJs to a single entity, such as OPM or the Administrative Conference, instead of to the individual agencies as is now the case, merits further consideration. It may be that even the minimal agency involvement in approving ALJ budget requests and the like contributes needlessly to the appearance of ALJ dependency. While I understand that this concept of centralization has been proposed in the past, and was subjected to intense criticism from some agencies, I think it would be fruitful if a fresh look were given to its pros and cons.

Finally, efforts at increasing ALJ independence ought to be accompanied by correlative efforts to assure high levels of ALJ performance. The Commission has in the past supported the concept of periodic evaluations of ALJs, as contained in regulatory reform legislation proposed by the Carter Administration and by Senator Ribicoff and others. So long as the agency itself is divorced from the evaluation process, I believe that periodic certification of high performance by the vast majority of law judges, together with a weeding out of the few who do not perform satisfactorily, can only enhance the respect for an independent corps of Administrative Law Judges.

That concludes my prepared remarks, Mr. Chairman. I will be glad to respond to questions.

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510

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May 20, 1986

The Honorable Nahum Litt
Chief Administrative Law Judge
U.S. Department of Labor
1111 20th Street, N.W.
Washington, D.C. 20036

Dear Judge Litt:

Thank you for your valuable testimony before the Subcommittee on Administrative Practice and Procedure on May 13, 1986. I regret that I was unable to chair the hearing. After reviewing the record, I have a number of questions.

Your written response to the following additional questions by June 4, 1986 would be appreciated.

1. I am concerned about alleviating heavy caseloads at agencies, without losing necessary agency expertise at the ALJ level. Thus, with respect to Black Lung Act cases, how could judges not familiar with the relevant statute help reduce your agency's backlog? Would the "learning curve" for ALJ's mean that the cases would be decided at a slower pace than at present?

2. If S. 673 were enacted into law today, how soon would you expect to see the Black Lung Act caseload level out?

3. Do you believe that S. 673, if enacted, would lead agencies to turn to more rulemaking proceedings, rather than ALJ proceedings, due to a sense that ALJ's are less accountable to the agency in a "policy" sense?

Your cooperation in providing responses to these questions will greatly assist the Subcommittee. Should you have any questions, please contact Sam Gerdano, counsel to the Subcommittee, at (202) 224-7703.

Sincerely,

CHARLES E. GRASSLEY
Chairman
Subcommittee on Administrative
Practice and Procedure

CEG;drs

PREPARED STATEMENT OF ERNEST G. BARNES

Mr. Chairman and members of the Subcommittee, my name is Ernest G. Barnes. I am Chief Administrative Law Judge at the Federal Trade Commission. I am pleased to appear today to discuss the recruitment, supervision, and retention of administrative law judges at the Federal Trade Commission and the independence of the administrative law judges at the Commission.

I have served as an administrative law judge at the Commission since December 1972, at which time I was appointed Assistant Chief Administrative Law Judge. I was appointed Chief Administrative Law Judge in January of this year. I am the senior judge at the Commission in terms of length of service as an administrative law judge. Before becoming an administrative law judge, I worked for 17 years as a staff attorney at the Federal Trade Commission in various capacities; as an investigating attorney, a trial attorney, Assistant General Counsel, and Assistant Director of the Bureau of Competition. I have completed my 25th year at the Federal Trade Commission.

At the present time there are eleven administrative law judges at the Commission. Each of our judges has at one time or another served as a staff attorney at the Commission. Six of our judges were selected from the Office of Personnel Management's lists of qualified applicants, and five judges transferred to the Commission from other agencies. These judges were selected because of their outstanding qualifications based on their known performance over lengthy periods of service with the Commission as trial attorneys, appellate attorneys, supervisory attorneys, and advisers to the Commissioners. These applicants all had a wealth of experience in the work of the Commission and their ability and dedication was established on the record. The Chairman of the Commission appoints the administrative judges, but in the past appointments have been made based in large part on the recommendations of the chief administrative law judge.

I am of the firm opinion that we have at the Commission a corps of highly qualified judges with wide experience in the work of the Commission. Their prior experience as staff attorneys has proven extremely beneficial in dealing with the complexities of Commission law enforcement. I have discerned no bias among our judges in favor of agency prosecutions; indeed, I do not believe that any such bias exists. Our decisions are based entirely on our independent evaluation of the merits of our proceedings. This independent decision-making is a requirement of our position and we strictly adhere to it. I believe it would be a disservice to the public to eliminate from consideration as administrative law judges with the Commission those applicants who are best qualified to be decision-makers by virtue of their past experience.

Recruitment of judges to serve at the Commission has never been a problem. As stated, we have a relatively small staff of judges. Further, the attorney staff at the Commission develops that experience which OPM recognizes as qualification for the position of administrative law judge. There are literally dozens of former Commission staff attorneys who have served or are now serving throughout government as administrative law judges. I am contacted frequently by some of these judges inquiring if there is a vacany at the Commission for an administrative law judge position. Thus, there would be no difficulty in finding a highly qualified applicant for any vacancy on our staff that might occur.

The administrative law judges at the Commission perform their responsibilities wholly independent of the Commission. Applicants for positions as administative law judges are examined and qualified by OPM. Once hired, the Administrative Procedure Act and the Commission's Rules of Practice assure the independence of the judge. We function completely apart from the Commision's legal and economic staff in preparing our budget requests, in determining our secretarial, clerical and administrative personnel needs, and in requesting office and hearing room space, furniture and supplies.

At every stage of our work independence is assured. Thus, when a complaint is issued by the Commission, the matter is immediately considered to be in formal adjudication and is referred to the Office of Administrative Law Judges for trial. As chief judge, I assign the matter to an administrative law judge. The cases are assigned on the basis of rotation as far as practicable. Once a case has been assigned, my involvement ends except in those rare instances when the assigned administrative law judge is not available and, as provided for under the Commission's Rules, I am authorized to sign subpoenas for the absent administrative law judge, or to grant procedural extensions of time, etc.

No chief administrative law judge has ever suggested to me, directly or indirectly, how to decide matters of substance, and as chief judge I have never done so. In our office, drafts of orders or opinions are not routinely distributed to the chief administrative law judge. The administrative law judge assigned to a case is solely responsible for the trial of the matter. He schedules hearings, determines where and when trials shall be held, supervises the official reporter, issues subpoenas, supervises and regulates discovery and trial preparation by the parties, receives and rules on all pretrial motions, conducts the trial, receives documentary and testimonial evidence, receives proposed findings and supporting legal memoranda, and writes an initial decision. In all of these functions the administrative law judge exercises his own independent judgement. There is no interference by the Commission or by me or by anyone else in the carrying out of these functions.

We do, of course, follow the Commission's published Rules Of Practice in conducting a trial. As trier of the facts and, in effect, as the lower court in the administative process, we are guided by existing legal precedents from previous Commission and court decisions. Any directive we may receive from the Commission during a trial is in the form of an interlocutory order or of remand instructions. These directives are made on the public record. There are no *ex parte* directives or instructions of any kind from the Commission in any case.

I might add that the Commission in recent years has placed more confidence in its administrative law judges and has amended its Rules Of Practice to place greater authority in the judges in the conduct of trials. Interlocutory appeals are permitted only with permission of the presiding administrative law judge. The conduct of pretrial and trial are within the discretion of the judge, and when interlocutory appeals are authorized, rulings are overturned only on a showing of abuse of discretion or of capriciousness. The presiding judge has complete charge of the discovery phase of the trial. In fact, discovery may be had only with the permission of the administative law judge.

In sum, our independence is an accepted fact at the Commission and both Commissioners and administrative law judges have made a positive commitment to preserve that independence as an institutional necessity. We are all aware that the credibility of the adjudicative process would collapse if there were any serious question about our independence. In my 25 years at the Commission I know of not a single incident in which anyone has even attempted to compromise this independence.

As for retention of judges, I am aware of three problems that have arisen within the past ten years. In one instance a judge retired during the trial of a matter and it was necessary to apppoint a new judge who determined to hear the case over from the beginning. In another instance, a judge who retired during the middle of a trial agreed to complete the matter as a rehired annuitant. This procedure was approved by the Civil Service Commission and the rehired judge completed the case. And finally, there is the matter of Judge Harry Hinkes, who retired before completing the Kellog proceeding.

The complaint in the Kellogg case issued in 1972 and Judge Hinkes was assigned the case. Judge Hinkes made a decision to retire as of the end of August 1978, some 6-1/2 years later. At that time, August 1978, the record in the proceeding consisted of approximately 32,000 pages of transcript of testimony and thousands of pages of exhibits and pleadings. The trial was within four or five weeks of completion when Judge Hinkes made his decision to retire. There would have remained the task of writing the initial decision, which would have been a substantial task because of the lengthy record and the complex and significant issues involved. I would estimate that there was about one year's work remaining for the administative law judge at the time Judge Hinkes made his decision to retire.

Then Chief Judge Daniel H. Hanscom and I were surprised at Judge Hinkes' decision to retire since the trial was nearly completed and the record that had been compiled was so extensive. It is my understanding that Judge Hinkes previously had made a commitment to Judge Hanscom to complete the case before retiring.

Since several million dollars had been invested by the government and by the parties in this lengthy trial, Judge Hanscom and I believed that we had an obligation to attempt to persuade Judge Hinkes to complete the case. We did make such an effort. We attempted to get Judge Hinkes to change his mind and not retire. We attempted to get Judge Hinkes to complete the case as a rehired annuitant.

Failing in these endeavors, we recommended Judge Hinkes be retained under contract to complete the case. In fact, Judge Hanscom and I believed that we would be subject to much criticism if we did not make every effort to have Judge Hinkes remain on the case as the presiding administrative law judge. Judge Hinkes did accept a contract to remain as presiding administrative law judge on the Kellogg case and to complete the case.

The Commission, after respondents objected to this contractual arrangement, stayed further proceedings in the case. Thereafter, the Commisison held that Judge Hinkes had become unavailable to the agency within the meaning of the applicable provisions of the Administrative Procedure Act upon his retirement and he was removed from the proceeding. Judge Alvin Berman subsequently was appointed to complete the case. Judge Berman has now completed trial of the Kellogg case and he is in the process of preparing an initial decision.

Respondents in the proceeding have filed numerous motions with the Commision concerning the relief that they contend should be granted in light of the events surrounding Judge Hinkes' retirement. The Commission recently ruled on most of these motions, but some currently are pending before the Commission for determination. I feel it would be inappropriate for me to comment on the particular facts and contentions that are now before the Commission. I know that this Subcommittee is equally concerned to avoid even the appearance of involvement in an ongoing litigation. Any decisions which the Commission may make in the Kellogg case respecting Judge Hinkes, or any other issue in the case, can be appealed to a federal court of appeals. Thus, respondents are assured of receiving full due process of law before any final order is entered against them.

In my view, I believe the Federal Trade Commission has a corps of administrative law judges that are competent, impartial, and independent. We perform our work wholly without agency interference, and certainly I, as Chief Judge, do not interfere with the decision-making. I believe the present system is working well.

Thank you for the opportunity to testify and I shall be pleased to respond to questions.

Senator HEFLIN. Judge Fowler.

Judge FOWLER. Thank you, Senator Heflin.

My name is William E. Fowler, Jr. I am chief administrative law judge for the National Transportation Safety Board.

I appreciate the opportunity to appear before you and to comment on the subject of administrative law judge corps legislation.

Prior to serving the past 8 years as chief judge for the NTSB, I have served as an administrative law judge at the Department of Labor, the Social Security Administration, and of course at the National Transportation Safety Board.

Now because of the exigencies of time, I am only going to comment on some of the highlights of my prepared statement, Senator.

We know, historically, that Congress has taken several steps to protect the independence of Federal administrative law judges. Section 11 of the Administrative Procedure Act, to some degree, separates the judges from agencies by prohibiting any agency from disciplining, promoting, or demoting an administrative law judge.

In 1972, a Federal regulation retitling hearing officers as administrative law judges became law. Finally, the enforcement of procedural rules under the APA theoretically ensures independence for administrative law judges and a fair hearing for the parties to adjudication. These protective measures, however, are insufficient because they have not achieved the goal of independence for administrative law judges. Eleven States, as you know, have enacted statutes that remove judges from their agencies and transfer them to an independent corps of administrative law judges.

Cases assigned to the judges operate through a centralized office distinct from the agencies. Enthusiasm and opposition have greeted similar legislation proposed at the Federal level.

Now although the Federal agencies do not control administrative law judges under law, the APA does not in any way protect the decisions of judges from more subtle agency influence.

The APA does not, for example, address the tension between an ALJ's role as an adjudicator and his association with one particular agency, nor does it preclude an agency's discriminatory deprivation of vital secretarial services or comfortable surroundings.

In my opinion, the establishment of an independent corps of administrative law judges would virtually eliminate actual bias and the perception of bias by removing administrative law judges from the influence of the agency.

Reforms that fail to separate administrative law judges from administrative agencies do not eliminate the threat of bias. Now opponents of the corps concept contend that any administrative law judge must have expertise in a particular area in order to make a proper decision in the adjudicatory proceeding.

They argue that the administrative proceedings focus on complex issues that lie outside the general judicial competence; that unless administrative law judges specialize in one administrative area, therefore, they contend, they cannot render intelligent decisions in agency proceedings.

Moreover, they argue, a lack of knowledge will lead to inefficiency. An administrative law judge, they say, who has heard cases in a particular area for a single agency for several years, will dispose of a case more efficiently than an administrative law judge who lacks knowledge in the subject.

In addition to the argument that an administrative law judge must specialize in order to render a competent decision, opponents of the corps concept claim that Congress created the position of the administrative law judge to enable agencies to generate policy through adjudication.

An administrative law judge therefore must consider the effect of a particular outcome on the relevant substantive area of administrative law.

Specialization leading to this expertise, according to these corps opponents, is critical—according to this argument—because only a knowledgeable administrative law judge furthers the goals and policies of the agency. These advocates of specialization believe that the need for expertise outweighs the need to protect the independence of the administrative law judges.

Now notwithstanding these arguments expounded by opponents of the corps concept, specialization is unnecessary. An administrative law judge does not need to specialize in one area, but in my opinion, should instead be an expert in the hearing of cases, in determining the ultimate facts, and interpreting and applying the law.

A person qualified in these respects will properly conduct a proceeding and capably make an intelligent decision in a specialized area.

Because the establishment of a central panel system will create interest in the administrative law judge position on the part of qualified people, a system in which administrative law judges receive assignments on a rotating basis should produce well-reasoned and unbiased outcomes.

Now not only is the specialization of administrative law judges unnecessary; it is counterproductive as well. A judge who hears the same type of cases on a daily basis will frequently rely on his preconceptions of the issues in rendering his decision.

Moreover, repetition of the same type of cases provides no intellectual challenge to specialized administrative law judges. Better quality decisionmaking results from a variety, that enables judges to hear a variety of cases.

Now in this, the era of Gramm-Rudman-Hollings budgetary control legislation, it cannot be emphasized too strongly, the markedly increased efficiency of the hearing process and the lowering of the overall operating costs engendered by the States who have established an independent corps of judges.

Indeed, it is difficult for me to believe in these current times of superconsciousness, where cost control and increased efficiency is so aware, why there has been, in my opinion, so much foot dragging on this corps legislation, that has been pending for years.

As this committee is well aware, the administrative law judges' corps legislation has been endorsed by the Federal Administrative Law Judges Conference, the National Conference of Administrative Law Judges, the Federal Bar Association, and, more recently, by the Judicial Council of the National Bar Association.

Now I have put in my statement a copy of the resolution that the Judicial Council of the National Bar Association passed. I did that, Senator, because there was a lot of hue and cry here a year or so ago, about minority organizations supposedly being against the corps concept. As you well know, the National Bar Association is the largest black or minority legal organization in this country, and I think that resolution spells out very well their position.

Now claims by opponents of the corps concept, that despite the success of many States currently utilizing the independent corps concept, the Federal system is, obviously, much larger and may be more difficult to transfer all Federal administrative law judges and Federal adjudicatory proceedings to a central corps, and that the experiences of the State systems are irrelevant in terms of the Federal system.

Well, in my opinion, such statements are misguided and misplaced, and they "fly in the face" of the revealing successes with the corps concept by such large States as California, New Jersey, Minnesota, Florida, and Massachusetts.

I would indeed be derelict to this committee, but even more importantly, to my fellow judges and colleagues, if I did not mention, in all frankness, honesty and candor, the growing movement of late among and by some Federal agencies, wherein judges are supervised by nonjudges.

In addition several agencies have completely removed the support staff and the clerical staff of judges from the judge's office and supervision under the guise of improving economy and increasing judicial performance and production.

I will be finished in just a moment, if you will bear with me. Such overt acts as these are somewhat, pale by comparison, to a host of extremely subtle practices by agencies concerning their judges, which tend to erode their judicial integrity and independence.

In my years as an administrative law judge, and as past president of the Federal Administrative Law Judges Conference, and presently as a member of the executive committee of that organization, and now, as chief judge of the National Transportation Safety Board, I have never seen, nor have I been as aware, as I presently am, of so many judges being intimidated by their agencies.

I will curtail my statement, Senator. I greatly appreciate this opportunity to have testified before the committee today, and I will be happy to answer any questions that you may have.

[The statement follows:]

Prepared Statement of William E. Fowler, Jr.

Mr. Chairman, and members of the committee my name is William E. Fowler, Jr., I am Chief Administrative Law Judge for the National Transportation Safety Board (NTSB). I appreciate the opportunity to appear before you and comment on the subject of Administrative Law Judge Corps legislation.

Prior to serving the past eight years as Chief Judge for the NTSB I have served as an Administrative Law Judge (ALJ) at the Department of Labor, the Social Security Administration and of course at the NTSB.

At present there are in excess of 1200 ALJs assigned to some 30 executive departments and regulatory agencies. Their proceedings touch the daily lives of all citizens and often affect the national economy.

ALJs preside in agency adjudication proceedings and their decisions constitute an integral part of federal policies. At the federal level, each ALJ serves one agency, hearing cases arising under that agency alone. This close association of ALJs with administrative agencies may lead to agency proceeding that are neither objective nor well-reasoned. Improper influence exerted by the agency, and an ALJs' perception that the agency evaluate his performance, deprive parties to agency adjudication of a fair hearing. In addition, the administrative process as a whole suffers due to a public perception of bias.

Congress has taken several steps to protect the independence of federal ALJs. Section 11 of the Administrative Procedure Act to some degree separates ALJs from agencies by prohibiting any agency from disciplining, promoting, or demoting an ALJ. In 1972, a federal regulation retitled hearing officers

"Administrative Law Judges" . Finally, the enforcement of procedural rules under the APA theoretically ensures independence for ALJs and a fair hearing for the parties to adjudication. These protective measures however are insufficient, because they have not achieved the goal of independence for the ALJs.

Eight States have enacted statutes that remove ALJs from their agencies and transfer them to an independent corps of ALJs. Cases assigned to the ALJs operate through a centralized office distinct from the agencies. Enthusiasm and opposition have greeted similar legislation proposed at the federal level.

Although the federal agencies do not control ALJs' under law, the APA does not in any way protect the decisions of ALJs from more subtle agency influence. The APA does not, for example, address the tension between an ALJs' role as adjudicator and his association with one particular agency. Nor does it preclude an agency's discriminatory deprivation of vital secretarial services or comfortable surroundings.

The establishment of an independent corps of Administrative Law Judges would virtually eliminate actual bias and the perception of bias by removing Administrative Law Judges from the influence of the agency. Reforms that fail to separate Administrative Law Judges from administrative agencies do not eliminate the threat of bias.

The quality of adjudicatory decision making in the present administrative system suffers from the long association of each ALJ with one agency. Adjudicators hearing the same type of case for any length of time may rely on their own preconceptions of a problem to decide a case. Although opponents of the central panel system argue that the administrative process depends on the expertise that an ALJ brings into the adjudicatory process, BETTER REASONED DECISIONS RESULT WHEN AN ALJ HEARS A VARIETY OF CASES. WHEN CONFRONTED WITH VARIED TYPES OF CASES, AN ALJ MUST BASE HIS DECISIONS ON KNOWLEDGE DERIVED FROM THE HEARING AND THE EXPERTISE OF OTHERS.

OPPONENTS OF THE CORPS CONCEPT CONTEND THAT ANY ADMINISTRATIVE LAW JUDGE MUST HAVE EXPERTISE IN A PARTICULAR AREA IN ORDER TO MAKE A PROPER DECISION IN THE ADJUDICATORY PROCEEDING. THEY ARGUE THAT THE ADMINISTRATIVE PROCEEDINGS FOCUS ON COMPLEX ISSUES THAT LIE OUTSIDE THE GENERAL JUDICIAL COMPETENCE. UNLESS ADMINISTRATIVE LAW JUDGES SPECIALIZE IN ONE ADMINISTRATIVE AREA, THEREFORE, THEY CANNOT RENDER INTELLIGENT DECISIONS IN AGENCY PROCEEDINGS. MOREOVER, THEY ARGUE, A LACK OF KNOWLEDGE WILL LEAD TO INEFFICIENCY. AN ADMINISTRATIVE LAW JUDGE WHO HAS HEARD CASES IN A PARTICULAR AREA FOR A SINGLE AGENCY FOR SEVERAL YEARS WILL DISPOSE OF A CASE MORE EFFICIENTLY THAN AN ADMINISTRATIVE LAW JUDGE WHO LACKS KNOWLEDGE IN THE SUBJECT.

IN ADDITION TO THE ARGUMENT THAT AN ADMINISTRATIVE LAW JUDGE MUST SPECIALIZE IN ORDER TO RENDER A COMPETENT DECISION, OPPONENTS OF THE CORPS CONCEPT CLAIM THAT CONGRESS CREATED THE POSITION OF ADMINISTRATIVE LAW JUDGE TO ENABLE AGENCIES TO GENERATE POLICY THROUGH ADJUDICATION. AN ADMINISTRATIVE LAW JUDGE, THEREFORE, MUST CONSIDER THE EFFECT OF A PARTICULAR OUTCOME ON THE RELEVANT SUBSTANTIVE AREA OF ADMINISTRATIVE LAW. SPECIALIZATION LEADING TO EXPERTISE IS CRITICAL ACCORDING TO THIS ARGUMENT, BECAUSE ONLY A KNOWLEDGEABLE ADMINISTRATIVE LAW JUDGE CAN RENDER A DECISION REGARDING A PARTICULAR SET OF FACTS THAT FURTHERS THE GOAL AND POLICIES OF THE AGENCY. THESE ADVOCATES OF SPECIALIZATION BELIEVE THAT THE NEED FOR EXPERTISE OUTWEIGHS THE NEED TO PROTECT THE INDEPENDENCE OF THE ADMINISTRATIVE LAW JUDGES.

Notwithstanding these arguments expounded by opponents of the corps concept, specialization is unnecessary. An Administrative Law Judge does not need to specialize in one area but should, instead, be an expert in the hearing of cases in determining the ultimate facts and interpreting and applying the law. A person qualified in these respects will properly conduct a proceeding and capably make an intelligent decision in a specialized area. Because the establishment of a central panel system will create interest in the Administrative Law Judge position on the part of qualified people, a system in which Administrative Law Judges receive assignments on a rotating basis should produce well-reasoned and unbiased outcomes.

Not only is specialization of Administrative Law Judges unnecessary, it is counterproductive as well. An Administrative Law Judge who hears the same type of cases on a daily basis will frequently rely on his preconceptions of the issues in rendering his decision. Moreover, repetition of the same type of cases provides no intellectual challenge to specialized Administrative Law Judges. Better quality decision making results from a system that enables Administrative Law Judges to hear a variety of cases.

Specialization of Administrative Law Judges proves counterproductive also in several other ways. First, a panel consisting of Administrative Law Judges experienced in many different areas is more efficient due to the flexibility in assignment. An Administrative Law Judge will always remain available to preside in a hearing regardless of which agency required the Administrative Law Judge. Also, rotation of assignments encourage agencies to promulgate more specific rules because they know that an independent Administrative Law Judge is not well-versed in their policies.

The present administrative system in which agencies have the opportunity to influence Administrative Law Judges leads to bias on the part of the Administrative Law Judges and a lack of quality decision making. These inherent problems deprive parties to agency adjudication of a fair hearing, and the administrative process as a whole suffers. Eight states have taken steps to alleviate the problems resulting from this system and have enacted legislation that establishes an independent corps of Administrative Law Judges. The corps system protects the independence of the Administrative Law Judges, improves the quality of their decision making and increases efficiency of administrative adjudication.

In this, the era of Graham-Rudman-Hollings budgetary control legislation, it cannot be emphasized too strongly the markedly increased efficiency of the Hearing Process and the lowering of the overall operating costs engendered by the states who have established an independent corps of Judges.

As this committee is well aware, the Administrative Law Judges corps legislation has been endorsed by the Federal Administrative Law Judges Conference, the National Conference of Administrative Law Judges, the Federal Bar Association and more recently, by the Judicial Council of the National Bar Association.

The following serves as a recent endorsement of the corp concept as exemplified by the following resolution of the National Bar Association:

RESOLUTION

SUPPORT FOR A FEDERAL ADMINISTRATIVE LAW JUDGE CORPS

Whereas, the public perception of Federal Administrative Law Judges should be that of an independence judiciary not connected to any particular government agency;

Whereas, the allocation of such judges should be to areas of the greatest need;

Whereas, the creation of a Corps would permit substantial cost savings based upon a large scale case management system;

Resolved, that the Judicial Council of the National Bar Association support the concept of a Federal Administrative Law Judge Corps as reflected for example, in the proposed S. 1275; HR 5156 (98th Congress)

Be it further resolved, that the President of the National Bar Association communicate its support consistent with the resolution to the Senate and House of Representatives Judiciary Committees and to the other members of the Congress by such means as may be appropriate.

Adopted by the Judicial Council of the National Bar Association, New Orleans, Louisiana, August 2, 1984.

Claims by opponents of the corp concept, that despite the success of many states currently utilizing the independent corps concept, that the Federal system is obviously much larger and it may be more difficult to transfer all Federal Administrative Law Judges and federal adjudicatory proceedings to a central corps, that the experiences of the state systems are irrelevant in terms of the federal system, such statements are misguided and misplaced, and they fly in the face of the revealing successes with the Corps concept by such large states as California, New Jersey, Minnesota, Florida and Massachusetts.

I would indeed by derelict to this committee, but even more importantly, to my fellow Judges and colleagues if I did not

MENTION A GROWING MOVEMENT OF LATE AMONG AND BY SOME FEDERAL AGENCIES WHEREIN JUDGES ARE SUPERVISED BY NON-JUDGES. IN ADDITION, SEVERAL AGENCIES HAVE COMPLETELY REMOVED THE CLERICAL AND SUPPORT STAFF OF JUDGES FROM THE JUDGE'S OFFICE AND SUPERVISION UNDER THE GUISE OF IMPROVING ECONOMY AND INCREASING JUDICIAL PERFORMANCE AND PRODUCTION. SUCH OVERT ACTS AS THESE ARE SOMEWHAT PALE BY COMPARISON TO A HOST OF EXTREMELY SUBTLE PRACTICES BY AGENCIES CONCERNING THEIR JUDGES, WHICH TEND TO ERODE THEIR JUDICIAL INTEGRITY AND INDEPENDENCE.

IN MY YEARS AS AN ADMINISTRATIVE LAW JUDGE, AND AS PAST PRESIDENT OF THE FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE, AND PRESENTLY A MEMBER OF THE EXECUTIVE COMMITTEE OF THAT ORGANIZATION AS WELL AS CHIEF JUDGE OF THE NATIONAL TRANSPORTATION SAFETY BOARD, I HAVE NEVER SEEN OR BEEN AS AWARE AS I PRESENTLY AM, OF SO MANY JUDGES BEING INTIMIDATED BY THEIR AGENCIES.

THE GUIDING PRINCIPLE TO WHICH CONGRESS SUBSCRIBED IN ITS ADOPTION OF THE ADMINISTRATIVE PROCEDURE ACT OF 1946, AND TO WHICH I AM SURE WE ALL SUBSCRIBE, IS THAT THE SYSTEM MUST INSURE THAT ADMINISTRATIVE LAW JUDGE ARE ALLOWED TO FUNCTION FREE FROM ANY ENCROACHMENTS UPON THIS INDEPENDENCE BY THE AGENCIES WHOM THEY SERVE.

PASSAGE OF THE PENDING LEGISLATION TO ESTABLISH AN INDEPENDENT ADMINISTRATIVE LAW JUDGES CORPS, IN MY OPINION, IS THE VERY BEST WAY IN WHICH TO INSURE THE REQUISITE JUDICIAL INTEGRITY AND INDEPENDENCE NECESSARY.

I GREATLY APPRECIATE THIS OPPORTUNITY TO TESTIFY BEFORE THE COMMITTEE TODAY. I WOULD BE HAPPY TO ANSWER ANY QUESTIONS THAT YOU MAY HAVE.

Senator **Heflin**. I have a lengthy letter here from John R. Bolton, Assistant Attorney General, Department of Justice, to Senator Thurmond which I will put in the record at this point.

[The letter follows:]

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

12 MAY 1986

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Thurmond:

This is in response to your request for the views of the Department of Justice on S. 673, a bill to establish an Administrative Law Judge Corps. The Department of Justice opposes the enactment of this legislation.

The bill is similar to S. 1275 of the 98th Congress, on which the Department testified on September 20, 1983. 1/ As indicated in our testimony of that date, we are fully in accord with the proposal's objective of maintaining a fair and effective system of administrative adjudication. We do not believe, however, that any problem with the existing system has been demonstrated that would justify the wholesale separation of administrative law judges from the agencies whose cases they hear. Moreover, we believe that the changes proposed by S. 673 would in some respects seriously disserve the public's interests in this important area.

I. Fairness and Public Confidence

A frequently emphasized objective of the Administrative Law Judge Corps proposal is ensuring both the reality and appearance of impartiality in administrative adjudications. It is suggested that bias against private parties results from the status of administrative law judges as employees of the same agencies which appear before them, through other personnel, to seek or defend adverse actions against such parties. Alternatively, it is suggested that there is a damaging public perception of partiality based on the employment relationship of administrative law judges and the agencies whose cases they hear, even if such partiality does not exist in fact.

However, the current system incorporates a number of safeguards of the impartiality of administrative law judges whose general adequacy has not been called into question. These

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1/ Administrative Law Judge Corps Act: Hearings on S. 1275 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 125-37 (1983) [hereafter cited as "1983 Hearings"].

include, for example, special arrangements relating to the selection, tenure and compensation of administrative law judges, a prohibition of supervision of administrative law judges by agency personnel with investigative or prosecuting functions, and a prohibition of participation in an administrative law judge's decision by agency personnel performing investigative or prosecuting functions in a case except as witnesses or counsel in public proceedings. 2/ The assertion of a lack of public confidence in the fairness of the administrative hearing process that would support the separation of administrative law judges from all agencies that currently employ them seems equally groundless. To the extent that problems of this sort are now thought to exist, or should arise in the future, in relation to particular agencies or administrative law judges, they would more sensibly be addressed through changes in agency policy or problem-specific legislation.

II. Efficiency

Proponents of the Corps proposal have suggested that it would improve the efficiency of administrative adjudication in two ways:

First, they have stated that economies would be realized through the consolidation of support services and systems that would be made possible by gathering all administrative law judges into a single agency. However, while some existing duplication might be eliminated in this manner, it is equally true that economies would be lost which are currently realized through the sharing of facilities and support services by administrative law judges and their employing agencies. Since no study of this question has been carried out, whether any net economies would result from the creation of an independent Corps is a matter of speculation at this point in time.

Second, proponents of the Corps proposal have stated that a unified Corps would be superior to the current system in matching the availability of judicial manpower to shifts in caseloads among the various agencies. However, temporary adjustments to meet fluctuations in caseloads can also be effected under an agency-based system of adjudication through interagency assignments. Since the general availability of judges to hear cases under the proposal would depend on decisions of the Corps' administrators, rather than on the agencies' own assessments of the needs of their programs, we have doubts that an assignment of judges of superior congruence with the needs of the various agencies would actually result.

III. Expertise

The current system of agency-based adjudication fosters a high degree of expertise in agency adjudicators. Under the proposal of the bill, administrative law judges would serve instead in broad subject matter divisions within the Corps, and could hear cases from any agency within the subject matter area of a division. The reduced expertise that would result from this change is one of the largest concerns raised by the Administrative Law Judge Corps proposal.

Proponents of the Corps proposal have usually responded by downplaying the importance of expertise in administrative adjudication. They have frequently drawn a comparison to the generalist character of the judiciary at the level of the courts,

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2/ See generally 5 U.S.C. §§ 554, 556-57, 3105, 5372, 7521.

which consists of district and circuit judges who may hear almost any type of federal case, and who become adept at assimilating new background information and legal knowledge as the need arises in the particular cases that come before them. It is argued that administrative law judges could function with equal effectiveness as generalists whose caseloads would include cases drawn from a variety of agencies and programs.

We find this argument unpersuasive for a number of reasons. To begin with, there are significant departures from adjudication by generalist judges even at the level of the courts. In a number of areas, Congress has created courts whose jurisdiction is limited to administrative cases of a single type or a limited number of types. These include the Tax Court, the Claims Court, and the Court of International Trade.

This argument also ignores a historic premise of our system of administrative law -- that expertise in specialized administrative areas is essential to prompt and informed decisions. The experience with generalist judges in the courts tends to confirm this premise rather than to call it into question. In fact, the judges of reviewing courts have at times expressed dismay at the difficulties they face in dealing with highly technical or esoteric administrative matters. 3/ Moreover, a judge who receives administrative cases on review generally has the benefit of a decision and record produced by an expert administrative law judge at the initial hearing of the case, as well as any additional opinions and analyses produced in the course of subsequent review within the agency. The reviewing court's function in such cases is also normally a limited one, extending only to review for errors of law and the sufficiency of the evidence to support the result under a deferential review standard.

In comparison, the proposal of this bill would entrust the trial and initial decision of administrative cases arising under the programs of dozens of agencies to judges of a separate Corps whose exposure to the subject matter area and operations of a particular agency could be slight or nonexistent. A change of this sort would take its toll in increased burdens on litigants to "educate" non-specialized judges at the administrative level, increased inaccuracy and unpredictability in initial decisions, and increased burdens on administrative reviewers and reviewing courts resulting from inadequate hearing records and unhelpful or erroneous initial decisions.

The experience of the Department of Justice in the use of administrative law judges lends support to these concerns. The Department currently employs a single administrative law judge in the Drug Enforcement Administration (DEA). His functions include hearing cases involving the granting, denial, and revocation of registration for practitioners, distributors, and manufacturers of controlled substances; cases concerning drug classifications; and cases involving production quotas for controlled substances.

The handling of such cases by a single expert judge on a regular basis is conducive to consistency, expedition, and accuracy in their determination. In comparison, prior to the Department's acquisition of an administrative law judge position for proceedings related to drug enforcement, such cases were

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3/ See International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 633, 641 (D.C. Cir. 1973); id. at 650-52 (separate opinion of Bazelon, C.J.).

handled by administrative law judges who were borrowed on an ad hoc basis from another agency. This earlier system proved highly unsatisfactory in practice, given the unfamiliarity of the judges utilized with the controlled substances area and agency precedent and policy.

The creation of an Administrative Law Judge Corps is likely to reproduce the problems of this earlier system. Since DEA cases would be a small fraction of the total caseload of a broadly defined division of the Corps, there is no assurance that any particular judge assigned to hear such cases would have significant familiarity with the controlled substances area, and little consistency or continuity could be expected in their handling. Since the prompt availability of administrative law judges for the hearing of such cases would depend on the willingness of the Corps' administrators to provide them, it seems evident that the proposed system would be less effective than the existing one in ensuring the expeditious discharge of the Department's drug control mandate.

The example of the limited but important areas in which the Department of Justice currently utilizes an administrative law judge is only illustrative. Other agencies would experience comparable problems resulting from the loss of expert judges and the loss of administrative control over the hearing system for the agency's cases. 4/ While a system in which administrative law judges would be fungible within large groupings of agencies could presumably operate in some manner, a change of this sort would sacrifice the characteristic strengths of administrative adjudication and would not, in our judgment, work nearly as well as the current system from a simple operational standpoint.

IV. Effectuation of Agency Policies

Administrative agencies are typically vested with a combination of executive, quasi-adjudicatory, and quasi-legislative functions. In many agencies and departments the volume of cases prevents the agency head from carrying out the agency's quasi-adjudicatory functions directly. This results in a need to rely on administrative law judges or other hearing officers to conduct hearings in cases arising under the agency's program, and to make an initial or recommended decision in such cases. The Administrative Procedure Act vests administrative law judges with a degree of independence in carrying out these delegated adjudicatory functions, so as to ensure that they will

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4/ *See* 1983 Hearings, *supra* note 1, at 368-73 (regarding the Commodity Futures Trading Commission); *id*. at 292-96 (regarding the Federal Energy Regulatory Commission); *id*. at 184-86 (statement of administrative law judges opposing S. 1275); *id*. at 150-51, 153, 155, 162-63, 166 (statement of NAACP).

Another example is provided by the Immigration Judges of the Department of Justice. While they are not technically administrative law judges, their functions are similar. It seems evident to us that initial hearings and decisions under statutes as complicated as the Immigration and Nationality Act should be handled by adjudicatory officers who are thoroughly familiar with the legislation, rather than by officers who are intermittently assigned to hear such cases as part-time work.

be discharged in a fair and impartial manner. Administrative law judges, however, remain fully subject to the agency head's decisions on matters of law and policy. 5/ In other words, agency heads may prescribe rules of decision to be applied by administrative law judges in deciding cases. Authority over the final decision of particular cases also remains with the head of the agency. 6/

We are concerned that the separation of administrative law judges from the agencies whose cases they hear would tend to cloud these well-established principles of administrative law, and would produce increased problems of inconsistency between administrative law judges' decisions and the policies of the responsible agency head. The reality of this concern is illustrated, for example, by the case of D'Amico v. Schweiker, 698 F.2d 903 (7th Cir. 1983), in which administrative law judges in the Social Security Administration brought suit to enjoin the implementation of a policy adopted by the agency head limiting the liability of social security beneficiaries for the repayment of improperly paid benefits. While the court in that case held that the plaintiffs had no standing to challenge the agency head's instruction, we think it is inevitable that instances of resistance to and disregard of agency policies would increase under the proposal of this bill. Administrative law judges stationed in a separate Corps, who would hear cases from many agencies, would have reduced expertise in determining and understanding the policies of those agencies and a reduced sense

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5/ See generally Attorney General's Manual on the Administrative Procedure Act 14-15, 55, 84 (Dept. of Justice 1947); Legislative History of the Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 2d Sess. 210-11, 229, 262-63, 272-73 (1946); Attorney General's Committee on Administrative Procedure, Administrative Procedure in Government Agencies 51, 53, 57 (1941); Administrative Procedure Act: Hearings on S. 1160, S. 1336, S. 1758, and S. 1879 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. 161-67 (1965) (testimony of Kenneth Culp Davis); D'Amico v. Schweiker, 698 F.2d 903 (7th Cir. 1983); Ass'n of Administrative Law Judges v. Heckler, Civil Action No. 83-0124, at 22 (D.D.C. Sept. 10, 1984) (Memorandum Opinion and Order). As we observed in an earlier communication to Congress: "The head of the agency may establish agency 'policy' and so control the exercise of its administrative law judges' discretion by regulation (both legislative and interpretative), guidelines and instructions.... [T]o the extent that the statute [administered by an agency] provides administrative discretion to choose alternative courses of action, that discretion resides in the head of the agency.... [T]he fundamental policy choices, which may, of course, affect the outcome of any case, are determined by the agency head." Letter of Assistant Attorney General Robert A. McConnell to Honorable Charles E. Grassley, Chairman, Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary (May 15, 1984).

6/ See 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision."). See generally Administrative Conference of the United States, Agency Review of Administrative Law Judges' Decisions (1983) (descriptive survey of intra-agency review of decisions of administrative law judges).

of responsibility for carrying out those policies in the decision of cases. 7/

One predictable consequence of this change would be an increase in appeals at the administrative level, occasioned by divergences on matters of law and policy between administrative law judges and reviewing authorities within the agency. A broader concern is the adverse effects of such a change on the public accountability of government. It would tend to increase the *de facto* policy-making role of adjudicatory officers who are insulated from political and public accountability at the expense of agency heads, who are formally vested with policy-making responsibilities and the exercise of administrative discretion by law, and who are ultimately accountable to the public through periodic appointment and confirmation by elected officials.

These concerns are reinforced by the proposal's termination of administrative control by agencies over administrative law judges. In agencies which frequently have to act on an emergency basis in particular cases, or which have policy initiatives that they wish to implement expeditiously through the bringing and adjudication of cases, control over the time and dockets of the officers who hear and initially decide such cases can be of great importance. By divesting agency heads of their existing administrative authority over administrative law judges, this proposal would make the timing and decision of administrative cases less responsive to the objectives and priorities of the agencies with substantive programmatic responsibilities, and more responsive to the institutional concerns and interests of an independent Corps. 8/

V. Formulation of the Proposal

The specific formulation of the Administrative Law Judge Corps proposal in S. 673 reinforces the general concerns noted above, and raises a number of additional concerns. The Corps would be governed by a Council composed entirely of administrative law judges. The Council would assume the existing authority of the various agency heads to promulgate rules of practice and procedure and would control the system for assigning administrative law judges to hear cases, but the agencies affected by these decisions would have no representation on the Council. While the President would initially choose the members of the Council, 9/ his choices would be limited to lists of

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7/ *See* M. Rich & W. Brucar, *The Central Panel System for Administrative Law Judges: A Survey of Seven States* 71-72 (1983)(in states having central pools of administrative hearing officers, agency policies and interpretations, other than those embodied in formal rules or regulations, are not considered binding by such officers).

8/ *See* the sources cited in note 4 *supra*.

9/ The Council would consist of a chief judge of the whole Corps together with the chief judges of its divisions. The chief judge of the Corps would be chosen at all times by the President subject to Senate confirmation. The other members of the Council would be chosen initially by the President, but thereafter by the chief judge of the Corps with the approval of the Council.

In addition to involving a peculiar degree of self-selection for the governing body of a governmental agency, the (Footnote Continued) nominees submitted by a Judicial Nomination Commission. Since the Council would be a policy-making and administrative body, it is difficult to see why the President's options in selecting its members should be so constrained. This concern is enhanced by

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(Footnote Continued)

procedure specified for selection of new members of the Council when vacancies occur raises substantial constitutional concerns. The Constitution provides that federal officers are to be appointed by the President subject to Senate confirmation, but that Congress may by law vest the appointment of inferior officers in the President alone, in the courts of law, or in the heads of departments. These are the exclusive means authorized for the appointment of federal officers. See Buckley v. Valeo, 424 U.S. 1, 124-26 (1976). The proposed procedure apparently rests on an implicit view of the chief judge of the Corps as the head of a department (the Corps itself) who may validly appoint inferior officers (the other members of the Council) in that department. However, in conditioning the appointment of new members of the Council on the approval of the Council's current membership, the bill effectively requires the head of the department to share the power of appointment with inferior officers and potentially deprives him of the capacity to make appointments consistent with his own judgment and will. In doing so, it utilizes a method of appointment that the Constitution does not authorize.
A similar problem was presented by legislation enacted in 1974, which provided for appointment of the Executive Director of the Commodity Futures Trading Commission by the Commission, subject to the approval ("advice and consent") of the Senate. In signing the legislation, President Ford noted that its provision for appointment of the Executive Director in a manner not contemplated by the Constitution raised serious constitutional questions. 1974 Pub. Papers 462. The validity of this point was later recognized by Congress, which changed the appointment procedure for the Executive Director on the basis of this concern. See S. Rep. No. 850, 95th Cong., 2d Sess. 28 (1978); H.R. Rep. No. 1181, 95th Cong., 2d Sess. 22 (1978). A provision for appointment by a department head subject to the approval of inferior officers, like a provision for appointment by a department head subject to the approval of the Senate, is not consistent with the Constitution's specification of permissible means for appointing federal officers.

We would note further that the bill is inconsistent in its identification of the "department head" for purposes of appointments. The provision for appointment of members of the Council by the chief judge of the Corps implies that the chief judge is the department head and that the other members of the Council are inferior officers. The bill provides elsewhere, however, that new administrative law judges are to be appointed by the Council, which implies that the Council as a whole is the department head. It is open to question whether the Appointments Clause permits agencies whose "department head" varies depending on the inferior officers to be appointed, where in one of those "department heads," the Council, all members but one -- the chief judge of the Corps -- would themselves be inferior officers. Cf. United States v. Germaine, 99 U.S. 508 (1878) (subordinate officers heading commissions and bureaus within executive departments cannot be vested with power of appointment); 37 Op. A.G. 227 (1933) (same); 10 Op. A.G. 204, 209-10 (1862) (inclusion on board of single officer who could constitutionally make appointments does not legitimize conferral of appointment power on that board where other members could not constitutionally make appointments).

the narrow membership of the Nomination Commission. 10/ Limiting in this manner the President's selection of the chief judges of the Corps and its divisions who make up the Council also represents a departure from existing provisions that authorize the selection of chief judges by the President in other contexts. 11/

The bill provides for selection of new administrative law judges by the Council of the Corps. Since all members of the Council would be administrative law judges, this would mean that the principal class of administrative adjudicators would be self-selecting. This unique conferral of authority on a class of public servants to determine its own membership heightens the general concerns raised by the proposal over the possibility of a Corps that would be insular and unresponsive to the public.

The bill's changes in the disciplinary system for administrative law judges are also troubling. Currently, agencies are barred by statute from taking the principal forms of disciplinary action against administrative law judges, and are required instead to institute proceedings before the Merit Systems Protection Board (MSPB) if they believe that such action is warranted. 12/ A complaint against an administrative law judge is initially heard by an administrative law judge employed by the MSPB. The administrative law judge's recommended decision on the complaint is thereafter subject to review by the MSPB itself, which has the final authority over disciplinary action.

The bill would add new restrictions to the extraordinary protections that the current system already affords to administrative law judges. The existing authority of agencies to institute MSPB proceedings would be transferred to the Council of the Corps. In proposing adverse action, the Council would be advised by a Complaints Resolution Board composed of two judges from each of the Corps' divisions. The Board would investigate complaints through three-judge panels that would make disciplinary recommendations to the Council. The subject of a complaint would have two peremptory challenges to members of the panel.

We doubt the wisdom of conferring the power to investigate complaints and make initial disciplinary recommendations upon a panel composed entirely of professional colleagues of the subject of the complaint. The impartiality of such panels would be particularly questionable in view of the

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10/ The Nomination Commission would consist of five members chosen by the chief judge of the D.C. Circuit, the chief judge of the D.C. District Court, the Chairman of the Administrative Conference, the President of the American Bar Association, and the President of the National Bar Association.

11/ See 28 U.S.C. §§ 1, 3 (implicit provision for Presidential appointment of Chief Justice subject to Senate confirmation); 28 U.S.C. § 171(b) (President designates chief judge of Claims Court); 28 U.S.C. § 251(b) (President designates chief judge of Court of International Trade); 10 U.S.C. § 867 (President designates chief judge of Court of Military Appeals). None of these provisions involve the use of a Judicial Nomination Commission or impose any comparable constraints on the appointment or designation of chief judges.

12/ See 5 U.S.C. § 7521.

fact that the subject of the complaint would have a voice in selecting the panel (through peremptory challenges), while the complainant would have no similar voice. Following investigation by a panel of administrative law judges, the Council of the Corps -- which would also be composed exclusively of administrative law judges -- would have to endorse the complaint before MSPB proceedings could even begin. While it is unclear what good would be accomplished through the addition of this cumbersome apparatus, it is evident that it would interpose additional obstacles to disciplinary action that has occasionally been necessary to redress abuses against litigants in administrative proceedings by administrative law judges. 13/

In sum, while we fully agree with the proponents of S. 673 that the improvement of the system of administrative adjudication is a worthwhile and important endeavor, we do not believe that creation of an Administrative Law Judge Corps would be a step forward. We would accordingly oppose the enactment of S. 673.

The Office of Management and Budget has advised that there is no objection to submission of this report from the standpoint of the Administration's program.

Sincerely,

Jol R. Bolton

John R. Bolton
Assistant Attorney General

13/ See, e.g., Chocallo v. Prokop, 2 M.S.P.B. 20 (1980); Social Security Administration v. Manion, Docket No. HQ75218210008 (MSPB Feb. 6, 1984).

Senator **HEFLIN**. I also have a letter from Chief Judge Wagner at the Federal Energy Regulatory Commission to Senator Grassley, which I will put in the record at this point.

[The letter follows:]

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

May 5, 1986

Honorable Charles E. Grassley
Chairman, Subcommittee on Administrative
  Practice and Procedure
Congress of the United States
Washington, D. C. 20510

Dear Chairman Grassley:

I wish to advise you and the members of the Subcommittee on Administrative Practice and Procedure of the Federal Energy Regulatory Commission's (FERC) continuing concerns with the concept of a unified corps of administrative law judges and specifically with the provisions of S. 673, the "Administrative Law Judge Corps Act".

S. 673 would create a unified corps of administrative law judges that will hear and render a decision upon every case subject to Section 554 of the Administrative Procedure Act and every case required by law to be held in accordance with Section 554 and Section 556 of the Administrative Procedure Act.

We at FERC have a number of concerns with the concept of a unified corps of Administrative Law Judges. First, it may be helpful to review very briefly the function of the independent regulatory agency and the role played by the agency office of administrative law judges. The independent regulatory agency has been characterized by some as an arm of the Congress performing a delegated function that the Congress could choose to perform itself. In part, at least, that characterization is probably accurate.

In carrying out its duties, the independent regulatory agency has three reasonably distinct missions:

1. Legislative -- when it issues franchises or certificates of public convenience and necessity; when it prescribes rules and regulations; and when it prescribes rates.

2. Executive -- when it requires reporting by jurisdictional entities and enforces its rules and regulations.

3. Judicial -- when it adjudicates disputes among parties.

The offices of administrative law judges of the various independent regulatory agencies are the trial judiciary of the agencies operating analogously to the United States District Courts in nonjury cases. The administrative law judges perform a delegated function of the independent agency which the agency, that is its members, could choose to perform. In performing this delegated function the administrative law judges must apply the policies enunciated by the agency and the laws enacted by the Congress, as interpreted by the agency and the courts, to the facts of particular cases.

This is an extremely important process because a formal, open, on-the-record hearing followed by a well-reasoned and fair decision makes it far more likely than otherwise that the ultimate decision of the agency, as approved by its members, will also be well-reasoned and fair.

This agency cannot support S. 673. First, most independent regulatory agencies, like the FERC, will be quite hesitant to delegate statutory functions to non-agency employees whose responsiveness they cannot control. Second, the same is true with respect to non-agency employees about whom the agency cannot feel assured there is a high degree of substantive experience in matters of the agency's jurisdiction. Both of these concerns have their basis in a single, fundamental premise: the agencies are clearly accountable, in one way or another, to each of the constitutional branches of government for the performance, or lack thereof, of their statutory responsibilities. The Congress supervises the agencies through substantive legislation, oversight and authorizations and appropriations; the judiciary through judicial review; and the executive through appointments and various kinds of substantive interventions.

Under the unified administrative law judge corps concept, an agency would have reason to fear a lack of responsiveness to its needs and priorities. It must be remembered that an administrative law judge's independence from the agency is solely decisional. Otherwise, he or she is bound by the agency's rules. Consequently, the agency sets the priorities in accomplishing its mission -- it can order one case to be heard before another, it can order immediate hearings, it can establish time limits, and the like. To reiterate, agencies would be understandably reluctant to assign cases, many of which are of national or international significance, for hearing before an official who is not accountable to the agency for the timeliness and manner in which he or she decides the agency's case, particularly since the agency will be held accountable for the conduct of such officials. This would be specifically true of the FERC where it is necessary on many occasions to order expedited hearings and decisions in order to meet national and international energy emergency situations. The agency would be inclined to lean more and more on deciding cases by written rulemaking or employee panels. In other words, if the hearing process is to remain a viable method of deciding and disposing of administrative or regulatory proceedings, the agency which is ultimately accountable to Congress in particular must perceive responsiveness on the part of decisional officials to whom decisional acts are delegated. Confidence in such officials is a function of ultimate accountability to the agency. The only accountability provisions of S. 673 is section 569 providing for removal and discipline. Those provisions, however, are so remote from the agency and uncertain of outcome that the necessary accountability is absent from the bill.

Concerns about the responsiveness of administrative law judges under the bill are crucially important to FERC, but they are essentially procedural. At least as important is the related possibility that matters could be referred to administrative law judges who are substantively inexpert in their handling. In this connection, it is useful to take as a model the average administrative law judge. There are some administrative law judges of well above-average ability who would be able to handle complex, arcane and specialized matters of the FERC's jurisdiction, but I am confident that their number is few indeed. The bill recognizes this problem and attempts to deal with it in the limited specialization provisions of section 564. Problematically, it would bring together in the Division of Communication, Public Utility and Transportation Regulation the work of six major economic regulatory agencies. During the past few years, the FERC has appointed administrative law judges from four of those agencies. It has taken a great deal of time and training for the transferred judges to become proficient in our specialized areas of jurisdiction and an even longer time for those judges to really feel comfortable with their new areas of work. These examples serve to illustrate, I believe, that the work of the major economic regulatory agencies is not so similar as to permit easy movement from the subject matter of one to that of another. Aside from this very important fact, there is no guarantee that there will even remain such a division. Section 564(b) provides that "... the number of divisions and the jurisdiction of each division shall be determined by the Council." After the first Council members (Division Chief Judges) are appointed by the President, their successors will be appointed by the Chief Judge with the approval of the Council. This means, in effect, that a specialized division will exist pretty much only in the discretion of the Chief Judge. Even assuming the continued existence of a specialized division, it must be kept in mind that after a few years the expertise -- gained from assignments in a specialized agency such as the FERC -- of the current judges placed in the various divisions will be lost through attrition. It is very doubtful that a new group of judges with the same expertise can be developed simply because there will be no place to get the necessary experience and training in a particular agency's jurisdiction, policies, etc.

I would like to point out another very important consideration, and that is, in general, the agency adjudication procedures play a very important function in policy making. It is by this route that agency policies frequently are fine-tuned. This is particularly true when the policies must be applied by the judge to factual situations that did not exist and were not anticipated when the policy was formulated. Further, in many instances, the agency policy is formulated through the adjudication process. Such procedures could not be effectively employed where the judge is not an expert in the policy and jurisdictional field of the agency. Certainly, the agency would not be prone to rely upon an individual that it did not observe on a day-to-day basis and who did not have a demonstrated knowledge of the industry regulated by the agency.

I want to say a few words concerning the independence of the administrative law judges at the FERC. The FERC administrative law judges enjoy total independence in the conduct of their hearings and in their initial decisions. Neither the Commission nor the Chief Judge discusses or reviews any judge's decision. The Commission and the Chief Judge see the initial decision for the first time when it is released to the public. Further, there is absolutely complete separation of the judges from the staff as well as the Commission. While the Commission staff presents a case in each proceeding, its case must sink or swim on its own merits. The judges at FERC, as well as their hearing rooms, library, and the like, are even isolated on a separate floor of the Commission's building. The ex parte rules in dealing with our judges apply to the Commission and the Commission staff as well as to the public.

The foregoing is not in any way intended to be all inclusive of the many problems we foresee would be created should a unified corps of administrative law judges be established by the Congress, but it is sufficient to demonstrate the need for much more study and consideration before such a giant step is taken to change the tried and proven current method of hearing and deciding administrative or regulatory disputes and problems which affect the lives of all the people of this great nation.

If I can be of further assistance to you in this or any other FERC matter, please let me know.

Sincerely,

Curtis L. Wagner, Jr.
Chief Administrative Law Judge

Senator **Heflin**. There is another vote on, and five bells have rung, so I have to go vote. Rather than hold anybody, I think we will just conclude the hearing. There may be some questions which will be submitted in writing. If you will, we would appreciate your answering them as soon as you can, and send them back. If there are any statements that anyone wishes to put in the record, the record will remain open for a period of time.

The hearing is concluded.

[Whereupon, at 4:28 p.m., the subcommittee was adjourned, subject to the call of the Chair.]

APPENDIX

The Federal Administrative Law Judges Conference

424 NATIONAL LAWYERS CLUB
1815 H STREET, N. W.
WASHINGTON, D. C. 20006

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James J. O'Meara, Jr. (NLRB)
Past President

April 30, 1986

The Honorable Charles E. Grassley
135 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Grassley:

The Executive Committee of the Federal Administrative Law Judges Conference has directed that the enclosed resolution be sent to you as a matter of great importance. The issues discussed therein are critically related to the public interest, the rights of social security claimants, and the decisional independence of social security judges.

Your kind attention to this most urgent matter will be most gratefully appreciated.

Respectfully,

Glenn R. Lawrence

Glenn R. Lawrence
President

Enclosure

RESOLUTION

WHEREAS:

1. The Social Security Act contemplates that decisions by administrative law judges in disability cases will be individualized determinations based on evidence adduced at hearings regulated and controlled by the judge.

2. The Administrative Procedure Act and the decisions of the courts contemplate a hearing and proceeding controlled by the judge from the time a case is assigned until an initial decision is issued.

3. The Supreme Court has held that administrative law judges have an obligation in a case where a claimant is unrepresented by counsel to inform themselves of facts relevant to their decisions and to learn the claimant's own version of those facts.

4. The aforesaid "duty of inquiry" derives from the claimants' basic statutory and constitutional right to due process in the adjudication of their claims, including a de novo hearing.

5. The duties and obligations of an administrative law judge are "functionally comparable" to that of all other federal judges.

6. Administrative law judges are, under the decisions of the Congress and the Supreme Court, required to hear and decide cases coming before them in accordance with their own understanding and conscience.

7. Congress has repeatedly rejected the establishment of quotas and mandatory deadlines in the processing of disability cases.

8. Congress has recognized that the time needed to make well-reasoned, sound, quality-crafted hearing decisions takes precedence over any policy designed to encourage the mass production of decisions.

9. In 1980 Congress amended § 405(b) of Title 42 to require that every initial determination of ineligibility contain an easily understandable discussion of evidence and reasons for a disability determination.

10. Congress has expressed concern that undue emphasis on the mass production of decisions has produced a marked loss of quality and uniformity in the agency decisions.

11. The Supreme Court has found that administrative law judges should be afforded sufficient time to deliberate to ensure accurate decisions, and to schedule new consultative exams if additional evidence is required.

12. Frank V. Smith, III. Associate Commissioner, Office of Hearings and Appeals, Social Security Administration, has established a concept known as the "reconfiguration" policy (also known as "functional teaming," "field office organizational structure, " or "model hearing office" policy).

13. The aforesaid "reconfiguration" policy removes from administrative law judges supervision and control over their support staff, i.e., (1) hearing clerks, (2) hearing assistants, and (3) legal assistants, and places responsibility for their selection and performance in non-judicial managers.

14. The replacement of the staff's individual accountability to the judge is designed to ensure the mass production of decisions to meet management quotas.

15. The establishment of production quotas for staff attorneys and lay assistants and the setting of a minimum of cases to be heard on trips away from the hearing office interferes with the conscientious exercise of judges' responsibilities.

16. The setting of numerical quotas on support staff pressures judges to meet quotas established by management without regard to the differences in individual cases.

17. By his policy memoranda of November 20 and December 21, 1984, the Associate Commissioner of OHA, SSA has established a program that tends to vitiate the ability of administrative law judges to make independent decisions.

18. The "reconfiguration" policy impedes the decisional automony and functional independence of administrative law judges, as well as the due process right of claimants to receive individualized, well-reasoned, sound, quality-crafted decisions.

THEREFORE IT IS NOW HEREBY RESOLVED: that the President of the Federal Administrative Law Judges Conference communicate to Frank V. Smith, III, Associate Commissioner, Office of Hearing and Appeals, Social Security Administration our deep concern that the policy of reconfiguration interferes with the decisional independence of administrative law judges and the due process rights of Social Security claimants, tax payers and others interested in a fair hearing.

AND BE IT FURTHER RESOLVED, that the President of the Conference communicate the views of the Conference to appropriate officials in the legislative and executive branches of the government and other interested persons.

NATIONAL LABOR RELATIONS BOARD

Washington, D.C. 20570

23 May 1986

The Honorable Charles E. Grassley
Chairman, Subcommittee on Administrative Practice
and Procedure
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Grassley:

The National Labor Relations Board wishes to express its opposition to S. 673, Administrative Law Judge Corps Act, which would create a corps of administrative law judges, replacing the present system of such judges working for the various boards and agencies. The NLRB is one of the agencies that uses a large number of judges, and is of the view that establishment of a centralized corps of administrative law judges would not be in the best interests of the Agency or of the constituencies which the Agency serves.

The corps proposal would likely result in the appointment and assignment of judges to hear cases under the National Labor Relations Act who would not have any relevant labor law background. Establishment of a corps would be destructive of all that the NLRB and the American Bar Association's Section on Labor and Employment Law have accomplished in assisting OPM to develop a group of qualified expert NLRB judges, and would undermine the efforts made by the Board and the Section to encourage private practitioners with labor law experience to become administrative law judges.

S. 673 provides for a chief judge of the entire corps and, at least initially, for 7 divisions, with a "division chief judge" for each. The chief judge and division chief judges would form a "Council," which is authorized to assign and transfer judges to and from divisions, and create new divisions or abolish divisions and regional offices of the corps. Thus, although the initial arrangement groups the NLRB with the Federal Labor Relations Authority, the day after the Council was constituted it could abolish the Division, lumping the NLRB with other regulatory agencies or with Social Security judges. At that point, judges with little or no experience with the NLRA would be hearing NLRB cases, and former NLRB judges would be hearing many cases for which they have no particular expertise. The non-expert judges would not even be able to achieve special qualifications by intensive on-the-job training, as can be done now with those relatively few judges who come to us without any prior labor law experience. They would undoubtedly take more time to write decisions, thus increasing delays, and because of their inexperience create additional difficulty for attorneys appearing before them and especially for the Board in its review of their decisions. The Board has always, in the majority of its cases, found itself able after thorough review to issue short-form decisions approving the judge's decision. This would be less likely if the Board were to review decisions issued by judges without any expertise. The Board's already difficult workload would be made even more difficult to process within any reasonable time limits. In addition, the present Board judges would spend much of their time on non-Board work, using their time to learn new fields, and squandering the expertise they have developed.

Furthermore, the United States Courts of Appeals, which often give deference to Board "expertise," would be less likely to do so if the judges rendering the initial decisions were generalists.

It is virtually certain that the bill's present alignment of a labor division consisting of NLRB and FLRA judges would not long survive. We anticipate that divisions would be consolidated if, as a result of deregulation, the work of some of the proposed divisions declines. And it is no secret that some supporters of the corps proposal regard the divisional set-up only as a necessary evil, "necessary" to obtain support of reluctant judges and practitioners, and "evil" because it dilutes the objective of the transformation of the administrative law judges into a general administrative court.

Under the proposed bill, two years after a corps is established the Council, and not the agencies whose cases the judges hear, would adopt rules and regulations applicable to all hearings before judges. It is true that the proposed bills do not mandate uniform rules of procedure. But the "corps concept" itself suggests that uniformity for the many agencies utilizing the corps would be most probable. Indeed, proponents of the corps visualize it as like the United States District Courts. And they also want the corps to be totally "independent" of the agencies served by it, which militates against separate procedural rules for each agency. Accordingly, we assume that these rules and regulations would have to be sufficiently general to cover proceedings ranging from regulatory, such as licensing and rate making, to enforcement, such as unfair labor and trade practices, and to claims work, such as social security and black lung. However, elaborate pre-trial discovery and written testimony which may be appropriate for a rule-making proceeding, may be inappropriate for and burdensome to unfair labor practice proceedings. We expect that in consequence these rules will differ substantially from those with which the labor bar is experienced and which have been time tested and refined. The substitution of an entirely new set of rules general enough to cover all administrative proceedings can only serve to create many issues regarding their implementation, interpretation, and application. The result, of course, will be to unsettle areas now well settled in practice before the Board.

One of the principal bases advanced by supporters of a corps is the notion that it would foster a more independent administrative judiciary. However, in the post-Administrative Procedure Act history of the Board, there have been no allegations of agency control over the decisional independence of NLRB judges. If what is meant is to remove Board control over the appointment process (which is already subject to OPM's procedures), that consequence operates as a strong argument against the corps concept.

Finally, the Board is opposed to a loss of control over its own caseload. Under the bill, the NLRB could not be assured of having unfair labor practices heard in a timely manner; that lack of control can only exacerbate delay in the issuing of Board decisions.

For all these reasons, the Board opposes S. 673.

The Office of Management and Budget advises that there is no objection to the submission of these views from the standpoint of the Administration's program.

Sincerely,

Donald L. Dotson

Donald L. Dotson,
Chairman

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

June 4, 1986

The Honorable Charles E. Grassley
Committee on the Judiciary
Chairman, Subcommittee on
  Administrative Practice and Procedure
United States Senate
Washington, D.C. 20510

Dear Senator Grassley:

I am compelled by the seriously misleading statement of Chief Judge Nahum Litt to your Subcommittee on May 15, especially as it concerns my integrity as a Judge, to enter the following response, and to ask that it be made a part of your record concerning the establishment of an ALJ Corps.

A sense of regret unavoidably attends the effort to defend one's good name and reputation as a Judge against an errant accuser who is himself a Judge. In this instance it is tempered by a certain relish to do battle with one who is so recklessly unfair about very serious matters, and who has shown so little care and concern for accuracy in his presentation to the Subcommittee.

Judge Litt used FLRA as an example of untoward influence upon ALJs by their agencies. The fair import of his remarks about my involvement in the PATCO case is that:

(1) The Chairman requested that I hear that case, thus placing the Judge with "understanding" of the Chairman's needs in position as trier of the facts.

(2) The United States Circuit Court, based on these allegations, appointed a master (ALJ) who found the above to be the facts.

(3) However, a finding of improper influence was rendered unnecessary because the public perception of the fairness of the process had already received a mortal wound even before the _ex parte_ communications were revealed, when I issued my previously written and duplicated decision within an hour or two of receiving briefs.

I think it necessary to correct Judge Litt line by line, so numerous and wanton are what might charitably be called his mistakes. Here we are fortunate, for there is an extensive and readily available record of the entire matter in the decision of the United States Circuit Court for the District of Columbia (685 F.2d 547), against which you can easily check the accuracy of his assault, and assess his sense of responsibility and his motives in leveling such serious charges in disregard of that record.

(1) The PATCO case had nothing to do, as he asserts, with improper removal of Air Traffic Controllers. It involved PATCO's right to represent them.

(2) I had no conversation with the Chairman about the selection of a Judge. I did have lunch with the other two Members of the Authority, as to which ALJ Vittone made findings. In his findings of fact, he concluded that those Members "urged Judge Fenton to assign a capable judge to the case and, if possible, to assign the case to himself" (685 F.2d 547, 619). In his discussion at page 620, he concluded that:

> On August 4, 1981, Members Frazier and Applewhaite met with Chief Administrative Law Judge John Fenton at lunch to discuss the procedural aspects of the PATCO case. During that discussion, it was suggested that Judge Fenton appoint a capable judge, preferably himself, to hear the PATCO case. No party has argued in its recommended findings that this luncheon meeting was improper. Further, I do not believe that it had any impact or effect on the FLRA's decision in the PATCO case. However, that finding does not mean that such practices should be condoned.
>
> It is clearly possible that the special selection or assignment of a judge to a particular case could raise substantial problems. There is no evidence that Judge Fenton's assignment of the PATCO case to himself raises any problems in this proceeding. However, the practice of agency heads suggesting that a particular judge be assigned to conduct a particular case should be avoided at the FLRA and all other federal agencies. Such a practice may conflict with 5 U.S.C. § 3105, and may raise questions of administrative fairness in those agencies which may attempt to influence the selection of a judge.

5 U.S.C § 3105 requires assignment of Judges in rotation so far as practicable.

(3) The Circuit Court did not appoint a master/ALJ based on allegations having to do with me. Rather, the Court, having been informed by the Justice Department that its Criminal Division and the FBI had investigated allegations of improper contact between a "well-known labor leader" and an Authority Member during the pendency of the PATCO case, ordered an "evidentiary hearing to determine the nature, extent, source and effect of any and all ex parte communications and other approaches that may have been made to any member or members of the FLRA" while that case was pending before it. (685 F.2d 547, 557). My discussion with the Members was revealed at that hearing, during examination of the Members by PATCO's attorney. As Judge Vittone noted, PATCO did not contend that this contact was in any way improper. Judge Vittone nevertheless scrupulously addressed the issue and found it conduct not to be condoned. As noted, he found no evidence that my having taken the case in the face of such a request raised any problem in that proceeding. I take him not to be condoning the request as opposed to criticizing me for hearing it.

Permit me here a personal observation, inasmuch as my integrity is at issue. I find a certain irony in Judge Vittone's approach. He questioned the propriety of a contact which might affect the required assignment in rotation and "raise questions of administrative fairness in those agencies which may attempt to influence the selection of a judge". That scrupulousness in addressing conduct not found offensive by the parties was admirable. But it may have deserted him when he made findings about me without even letting me know that my conduct was in issue and providing me with an opportunity to testify. In fairness to him, he may have thought it unnecessary because he did not fault me. My recollection differs from that of Member Frazier, whose testimony forms the basis for Judge Vittone's finding. I recall that Mr. Frazier, understandably anxious that the Authority acquit itself well in response to a nationwide airline strike, did ask that I appoint a capable Judge. He then smiled, seeing the latent humor in his request, and said that the use of the word capable was not intended to exclude me. We laughed. I certainly did not take his words as an attempt to instruct me to assign myself. Nor, in my 14 years as an ALJ (all as Chief or Associate Chief) have I ever been personally aware of any effort by any agency official to intrude upon the independence of a Judge. Certainly FLRA officials have been absolutely scrupulous in this respect.

(4) Judge Litt's statement that a finding of improper influence was rendered unnecessary because I had already dealt a mortal wound to the public's perception of a fair proceeding by having my decision prepared for issuance upon receipt of the briefs, is simply wrong. Judge Vittone, as already indicated, found the contact had no effect upon the decision. More importantly, the United States Circuit Court found, at page 575:

> Moreover, the facts of this case are free from any arguable taint. The extensive inquiry revealed no improper attempts to influence Chief ALJ Fenton or his fact-finding. The FLRA did not alter his factual conclusions. (underscoring mine).

The Court did, in a sense, address the matter of my very prompt issuance of my decision (page 554). Thus, it noted that PATCO had excepted to my decision on the ground that I "failed to give reasoned consideration to its brief". It noted that FLRA rejected that argument because my "Decision did address the arguments raised in PATCO's brief (despite a period of only four hours between the filing . . . and the issuance)", and that PATCO did not renew that argument before the Court.

The Court otherwise found no merit to any of the arguments about the fairness of the manner in which I handled the case. I of course, make no apologies for dealing with a case of such moment as quickly as I responsibly could. I am proud of that achievement. There was no real dispute over the facts, and the legal arguments were easily anticipated. My decision was, indeed, ready to go in the event that briefs failed to raise issues I had not already covered to the best of my ability.

In sum, it is clear that a Chief Judge has deliberately disregarded the findings of a United States Circuit Court of Appeals in his testimony before your Subcommittee because those findings conflict with his purposes. One can speculate on what overriding ambitions and personal agendas might explain such conduct in the face of an easily ascertainable public record which reveals his very grave accusations to be falsehoods. Should the Subcommittee be tempted to give serious consideration to his views on the need for a Corps and the claimed inadequancies of the present system, it is imperative that it consider those agendas and his demonstrated willingness to mislead it in order to advance them, as it weighs his testimony about other agencies.

The burden of Judge Litt's remarks about my caseload seems to be that it has been consistently "over estimated" (sic) and, in fact, misrepresented to the Congress. It should first be noted that the "depositions (sic) after hearing" which he notes are not simply "caseload", i.e., the amount of work we receive. They are, as estimates, a prediction of the number of decisions which a given number of Judges can write, with whatever consequences that will have on backlog and timeliness of decisions. As he notes, the 1985 Budget Request estimate for such decisions was 191. That projection was made in December of 1983 in an attempt to forecast two years ahead. In the following year (1984) that was revised to 154, based essentially on a sharp increase in the settlement rate and a drop in complaints. Thus the 191 forecast was associated with 688 other cases in which I anticipated settlement, and the 154 decisions were associated with 704 cases which I expected would be settled on the basis of an improving settlement performance. The decline of cases disposed of was from 877 to 848. I saw no need to reduce the number of Judges given the ample backlog to be worked and the uncertainties of the future, which included the likely loss of Judges.

Litt also says that our FY 86 budget submission indicated actual disposition of 162 cases after hearing, whereas a docket survey indicated 137 such decisions. Aside from noting that those 162 decisions are eight more than I had predicted the year before, the discrepancy he finds, but did not inquire about through his staff member who made his count, arises from my two systems of counting the decisional product. Cases are counted, by case number, as the General Counsel prepares to issue complaints and seeks docket space. They must be counted the same way - by case number - as they leave the system if my books are to balance. Each case number is therefore counted as a decision even though they may have been consolidated for hearing and issue in one "decision" or document. I also count by documents. In 1985 we issued 162 cases by number and 140 (not 137) by document.

In terms of my capacity to help Litt, which is what his undertaking in this respect is allegedly about, I would make two points. First, though he has expended considerable DOL resources in an effort to determine how many Judges I need (in an area of which he is unusually ignorant), he has never discussed the matter with me, and he has never requested help from me. Second, although my caseload has declined, one ALJ left in February of 1985 and another last month. He knows this, and knows he is beating a dead horse for other purposes.

I would also make several general points about matters within my experience. (Unlike Litt, I try to confine my serious remarks to matters within my competence). Litt attempts to rate the difficulty of cases at the NLRB and here. I spent over 20 years at NLRB, leaving the post of

Assistant General Counsel to become Associate Chief ALJ at DOL for eight years. I know well the work of DOL, including Black Lung. His characterization of "most" work at NLRB as routine is, apart from his motives, simply silly. The range of case law to be understood and applied in labor cases, and the caliber of counsel encountered, makes most DOL work trivial in comparison. The latter can often be disposed of by formula. A look at the volume of Labor Board vs Labor Department cases which receive the attention of the Courts, and the many and sharp splits among the Circuits in Board cases attest to the vast difference in their complexity.

Finally, I would note that it is evident that Litt spends considerable DOL resources monitoring the work of other agencies, under the guise of demonstrating the presence of available manpower elsewhere, but, one must suspect, in the self-aggrandizing effort to become Super Judge over the Corps. This, and his spirited defense of the EPA ALJ's*/ use of government time and resources on the affairs of ALJ professional associations suggests that he sees no limit to such expenditure of agency appropriations except those imposed by the conscience of the individual Judge, whatever its impact on that agency's work.

Respectfully,

John H. Fenton

John H. Fenton
Chief Administrative Law Judge

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*/ Note that his treatment of this matter, one of seven examples of "Direct and obtuse, if not clearly improper occurrences (which) are, and have been rampant" contains no slight suggestion that the investigation of that Judge's conduct is based on any consideration tied to her judicial independence. The author is indeed obtuse as to the purpose of this example.

STATEMENT OF
THE CHAIRMAN AND MEMBERS OF THE
NATIONAL LABOR RELATIONS BOARD

before

THE SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE
OF THE SENATE JUDICIARY COMMITTEE

Judge Litt states (p. 2 of his written submission), "I encourage this committee to look at agency responses opposing this bill and their appropriation submissions in the light of the attached analysis of their current workloads." One of the agencies referred to is the National Labor Relations Board (pp. 20-21). The errors in Judge Litt's case-load analysis compel us to respond.

Among other things, Judge Litt states that "current case filings are probably mostly Section 8(a)(3) cases, which are charges of unfair discharge of an employee. It is estimated that these cases, turning almost entirely on resolution of factual issues, take a day or two at trial and should not take more than a week to prepare and issue a decision." In fact, as of 16 May 1986, there were 11 unfair labor practice hearings in progress before our judges which had already taken 4 weeks of hearing; two of them were into their 10th week. Cases awaiting judges' decisions included 50 cases with transcripts of 1,000 or more pages. One of them had about 14,000 pages, another close to 8,000, a third 6,000, and 3 more were approximately 4,000 pages long. Exhibits in these cases were also voluminous, commensurate with the length of the cases. For the first 7 months of this year, average transcript pages per decision issued were 510, reflecting an average hearing length of 2.77 days. Judge Litt's innuendo that the NLRB has concealed information about case types which it "now admits" keeping is totally unwarranted. The Board publishes voluminous information about its case load, and makes even more information available to appropriations committees. To the extent that it has broken down information on case filings to show the numbers which involve only discriminatory discharges, however, that information is of virtually no use in predicting difficulty or length of cases. Many discharge cases involve multiple discharges, and most involve allegations of other violations of the Act as well. This is not the group of routine short and simple cases that Judge Litt attributes to the National Labor Relations Board.

Judge Litt states that the National Labor Relations Board "has few secretaries and no law clerks: a good law clerk can double the output of a judge on routine type cases and most of the National Labor Relations Board cases are routine."

We are not certain what point Judge Litt is making. We have the secretarial help for which we are budgeted, and it is sufficient. As for law clerks, the Judges Division has always employed student assistants (normally third year law students, with some second year students) to assist the judges. These assistants generally do research on legal questions, and on rare occasions draft decisions for judges in those few cases that the judges deem sufficiently routine. For one 2-year period, the Judges Division also had 12 full-time law clerks on an experimental basis. Perhaps the decisions of the Department of Labor are such that a law clerk can double the output of a judge; this was not, and is not, the case at the Board. Indeed, when there was discussion between Judge Litt and Chief Judge Welles of the National Labor Relations Board in relation to lending judges to DOL to help them with their "black lung" case backlog, Judge Litt indicated that judges can hear as many as 20 black lung cases in 1 week. Given a normal 40-hour week, and at least some time lost between cases, those cases could not average more than an hour or so each. By contrast, the cases before the Board average nearly 3 days each.

When Judge Litt asked early this fiscal year to borrow National Labor Relations Board judges to assist DOL in reducing its black lung case backlog, Judge Welles, with the Board's approval, readily agreed to lend him 10 man-years' worth of judges. The Board felt impelled to require reimbursement for the loan because of the purpose rule, 31 USC § 1301(a), which on its face prohibits application of appropriations for objects other than those for which the appropriations were made. However, the Board informed Judge Litt that it would loan judges on a nonreimbursable basis if either agency could obtain an opinion from GAO that reimbursement was not required. After several months of discussions on whether DOL would reimburse the Board for the borrowed judges, a reimbursement agreement was finally reached. Judge Litt then cancelled his request for the loan of judges after getting OPM approval to hire 12 new judges.

Chairman Dotson has already submitted a statement of the National Labor Relations Board opposition to the corps bill. We would only add that the kinds of difficulties that existed with the loan program stemming from Judge Litt's desire not to reimburse the NLRB can be easily removed by action far less drastic than creation of a judges corps. If Congress desires that judges be loaned without reimbursement, it can simply provide an exception to 31 USC § 1301(a) for that purpose. If reimbursement is to be required, as a result of our experiences with Judge Litt and more recently with four other agencies, we now have model agreements which can permit the loan of judges on short notice to meet other agencies' needs.

In Judge Litt's statement, he refers to assaults on the independence of SSA judges, and goes on to state, "At other agencies, the abuses are no less onerous." We cannot speak for all other agencies, but if he is referring to the Board, we are not aware of any "abuses" having occurred, or alleged to have occurred, in our 51-year history.

Judge Litt states his views do not reflect the official views of the Department of Labor. If that is so, we respectfully suggest that the subcommittee might be interested in Labor's official view of the corps bill.

PREPARED STATEMENT OF MARTHA A. MCSTEEN

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

THANK YOU FOR THE OPPORTUNITY TO SUBMIT THE FOLLOWING STATEMENT TO YOUR COMMITTEE WHICH REPRESENTS THE DEPARTMENT OF HEALTH AND HUMAN SERVICES' VIEWS ON S. 673, A BILL TO ESTABLISH AN INDEPENDENT ADMINISTRATIVE LAW JUDGE (ALJ) CORPS.

AS YOU ARE AWARE, THE BILL IS SIMILAR TO S. 1275 OF THE 98TH CONGRESS, ON WHICH SSA SUBMITTED A STATEMENT FOR THE RECORD OF THE SEPTEMBER 20, 1983 HEARING. WE STRONGLY OPPOSE ENACTMENT OF S. 673 FOR MANY OF THE SAME REASONS THAT WE EXPRESSED IN OPPOSITION TO S. 1275. WHILE WE SHARE YOUR CONCERN ABOUT ENSURING THE FAIRNESS AND EFFECTIVENESS OF THE ALJ HEARING PROCESS, WE BELIEVE THAT THE BILL WOULD ADVERSELY AFFECT THAT PROCESS AND WOULD INCREASE COSTS.

I WANT TO ADDRESS PARTICULARLY THE TWO PURPOSES FOR ESTABLISHING AN INDEPENDENT ALJ CORPS THAT SENATOR HEFLIN CITED WHEN HE INTRODUCED S. 673 ON MARCH 14, 1985--PROVIDE NEEDED INDEPENDENCE FOR ALJS AND GENERATE SIGNIFICANT COST SAVINGS AND EFFICIENCIES IN OUR ADMINISTRATIVE SYSTEM.

ALJ INDEPENDENCE

THE SOCIAL SECURITY ADMINISTRATION (SSA) HAS ALWAYS GUARANTEED THE INDEPENDENCE OF ALJS WITH REGARD TO INDIVIDUAL CASE

ADJUDICATION. ALTHOUGH ALJS WHO HEAR SOCIAL SECURITY CASES ARE EMPLOYEES OF SSA, THERE ARE SUFFICIENT SAFEGUARDS BUILT INTO THE PERSONNEL SYSTEM TO PROTECT ALJ INDEPENDENCE BEGINNING FROM THE TIME THEY ARE HIRED AND THROUGHOUT THEIR CAREERS. SSA IS NOT INVOLVED IN THE ALJS' APPLICATION PROCESS, EVALUATION, OR PLACEMENT ON THE PERSONNEL REGISTER FOR SELECTION--ALL THESE FUNCTIONS ARE PERFORMED BY THE OFFICE OF PERSONNEL MANAGEMENT (OPM). AGENCY HIRING ONLY OCCURS AFTER OPM CERTIFIES A LIST OF CANDIDATES TO THE AGENCY THAT ARE RANKED IN ORDER BASED UPON THEIR EXPERIENCE, EDUCATION, VETERANS' PREFERENCE, AND GEOGRAPHIC PREFERENCE.

OPM ALSO ESTABLISHES THE COMPENSATION LEVEL FOR ALJS. FURTHER, ANY ADVERSE PERSONNEL ACTIONS SUCH AS SUSPENSION OR REMOVAL CAN ONLY BE TAKEN WHEN GOOD CAUSE IS ESTABLISHED AND AFTER THE OPPORTUNITY FOR A HEARING BEFORE THE MERIT SYSTEM PROTECTION BOARD. ALJS ARE ALSO APPOINTED PURSUANT TO THE ADMINISTRATIVE PROCEDURE ACT (APA), WHICH GUARANTEES THAT ALJS ARE TO CARRY OUT THEIR DECISIONMAKING RESPONSIBILITIES FREE FROM ANY AGENCY PRESSURE OR INFLUENCES. EX PARTE COMMUNICATIONS ARE PROHIBITED, AND CASES ARE ASSIGNED IN ROTATION INSOFAR AS IS PRACTICABLE.

FOR OVER 45 YEARS SSA HAS GUARANTEED THE INDEPENDENCE OF ALJS IN THEIR CASE ADJUDICATIONS AND NEVER ATTEMPTED TO INFLUENCE THE OUTCOME OF ANY HEARING. SSA IS COMMITTED TO PROVIDING AND PROTECTING THE RIGHTS OF CLAIMANTS TO A FULL AND FAIR HEARING CONDUCTED BY AN IMPARTIAL DECISIONMAKER.

ADMINISTRATIVE EFFICIENCY AND COST SAVINGS

WE DO NOT BELIEVE THE BILL WOULD ACHIEVE THE INTENDED RESULT OF REDUCING COSTS AND IMPROVING ADMINISTRATIVE EFFICIENCY. IN FACT, THE EFFECT OF THE BILL COULD WELL BE TO IMPAIR ADMINISTRATIVE EFFICIENCY AND INCREASE COSTS AND PROCESSING TIMES, THUS RESULTING IN LESS TIMELY DECISIONS FOR CLAIMANTS. THAT IS LARGELY BECAUSE SSA'S EXTENSIVE POLICY AND ADMINISTRATIVE EXPERIENCE, WHICH THE CORPS WOULD NOT HAVE, ENABLES US TO ESTIMATE THE SIZE AND CHARACTER OF AGENCY WORKLOADS AND TO TAKE STEPS TO DEAL WITH THEM EFFECTIVELY.

SSA'S ALJS COMPRISE ABOUT 67 PERCENT OF ALL THE ALJS IN THE FEDERAL GOVERNMENT. IN FY 1985, WE RECEIVED 245,000 NEW HEARINGS CASES. THAT LEVEL IS BELOW THE FY 1983 PEAK WORKLOAD OF 360,000, PRIMARILY BECAUSE OF THE MORATORIUM ON CONDUCTING CONTINUING DISABILITY REVIEWS (CDRS) UNTIL THE PROVISIONS OF THE 1984 DISABILITY REFORM AMENDMENTS COULD BE IMPLEMENTED. HOWEVER, FOR FY 1987, WE ANTICIPATE A WORKLOAD OF 336,000 HEARINGS REQUESTS.

EVEN WITH THIS HUGE HEARINGS WORKLOAD, SSA CONTINUES TO MAINTAIN THE HIGHEST ALJ LEVEL OF PRODUCTIVITY OF ANY FEDERAL AGENCY WHILE MAINTAINING HIGH QUALITY DECISIONS. IN THE PEAK WORKLOAD PERIOD OF FY 1983, THE AVERAGE NUMBER OF DISPOSITIONS PER ALJ WAS 37 CASES PER MONTH. WE WERE ABLE TO MAINTAIN THIS SAME PRODUCTIVITY LEVEL IN FY 1984. ALTHOUGH THE IMPLEMENTATION OF THE

1984 DISABILITY REFORM LEGISLATION RESULTED IN OUR PRODUCTIVITY LEVEL DROPPING TO AN AVERAGE OF 29 DISPOSITIONS PER ALJ PER MONTH DURING 1985. OUR DATA FOR THE FIRST QUARTER OF FY 1986 REFLECTS AN INCREASE IN PRODUCTIVITY TO AN AVERAGE OF 31 DISPOSITIONS PER ALJ PER MONTH.

WE BELIEVE THAT THIS TREND TOWARD HIGHER PRODUCTIVITY WILL CONTINUE BECAUSE MUCH OF THE ORIENTATION AND TRAINING ON THE 1984 AMENDMENTS IS COMPLETE AND BECAUSE WE HAVE BEEN TAKING OTHER STEPS TO ENHANCE PRODUCTIVITY. FOR EXAMPLE, WE ARE NOW EXAMINING HEARINGS OFFICE CASE PROCESSING TO ENSURE THAT ALJS HAVE THE OPTIMAL MIX AND AVAILABILITY OF SUPPORT SERVICES. A COMMITTEE OF ALJS IS STUDYING RULES OF PRACTICE AND PROCEDURES FOR HEARINGS TO SEE IF ADDITIONAL REFINEMENTS ARE NEEDED. IN ADDITION, WE ARE DEVELOPING AN AUTOMATED CASE TRACKING SYSTEM TO AID IN IDENTIFYING DELAYED CASES.

WE ARE CONCERNED THAT ALJ PRODUCTIVITY WOULD DECREASE UNDER S. 673 BECAUSE IT WOULD BE MORE DIFFICULT TO FINE TUNE A GOVERNMENT-WIDE ALJ HEARINGS PROCESS THAT IS NOT UNDER THE ADMINISTRATIVE JURISDICTION OF THE AGENCY TO TAKE ACCOUNT OF CHANGING SOCIAL SECURITY WORKLOADS AND OTHER CONDITIONS THAT AFFECT THESE WORKLOADS (SUCH AS THE ENACTMENT OF LEGISLATION).

WE ARE ALSO CONCERNED THAT THE POTENTIAL ASSIGNMENT OF OTHER TYPES OF HEARINGS CASES TO ALJS WHO NOW CONCENTRATE ON HANDLING SOCIAL SECURITY CASES EXCLUSIVELY COULD ADVERSELY AFFECT

PRODUCTIVITY. FINALLY, WE BELIEVE THAT THE TRANSFER OF SSA'S ENTIRE WORKLOAD TO ONLY ONE OF SEVEN INITIAL CORPS' DIVISIONS COULD RESULT IN ADMINISTRATIVE INEFFICIENCIES AND INSUFFICIENT RESOURCES SINCE 67 PERCENT OF THE GOVERNMENT'S ALJS NOW WORK ON SSA CASES.

IN ADDITION TO ADDRESSING SENATOR HEFLIN'S CITED PURPOSES FOR ESTABLISHING THE INDEPENDENT ALJ CORPS, I WANT TO BRIEFLY MENTION SEVERAL OTHER CONCERNS THAT WE HAVE WITH S. 673.

UNIFORM DECISIONMAKING

A PRIMARY CONCERN OF SSA, THE CONGRESS, AND THE PUBLIC ABOUT THE SOCIAL SECURITY DISABILITY PROGRAM OVER THE PAST SEVERAL YEARS HAS BEEN UNIFORMITY AND CONSISTENCY OF DECISIONMAKING BOTH ACROSS THE VARIOUS ADJUDICATIVE LEVELS AND WITHIN EACH LEVEL. SINCE DISABILITY INSURANCE IS A NATIONWIDE PROGRAM, WE FIRMLY BELIEVE THAT IT CAN TRULY BE FAIR AND EFFECTIVE ONLY IF IT IS ADMINISTERED IN A UNIFORM AND CONSISTENT MANNER ACROSS THE COUNTRY.

AT THE ALJ LEVEL, SSA STRIVES TO ENSURE THAT AGENCY POLICIES ARE CLEARLY ENUNCIATED AND THAT ANY CLARIFICATIONS OR CHANGES TO THOSE POLICIES ARE PROMPTLY DISTRIBUTED SO THAT ALJS CAN MAKE COMPLETE AND ACCURATE DECISIONS WHICH ADHERE TO THOSE POLICIES. IN ADDITION TO PROMULGATING REGULATIONS, SSA ALSO ISSUES A SERIES OF RULINGS (BINDING ON ALL LEVELS OF ADJUDICATION) THAT PROVIDE UNIFORM INTERPRETATIONS TO ALJS. NEW ALJS GET 6 WEEKS OF FORMAL

TRAINING AND THEIR WORK IS REVIEWED FOR 6 MONTHS. SSA ALSO CONDUCTS ONGOING TRAINING FOR CURRENT ALJs AND FOR THEIR SUPPORT STAFFS THROUGHOUT THEIR CAREERS. OUR MOST RECENT EFFORTS INCLUDED SEVERAL DAYS OF TRAINING COVERING MAJOR ITEMS RELATING TO IMPLEMENTATION OF THE 1984 DISABILITY AMENDMENTS.

IN ADDITION, SSA'S APPEALS COUNCIL CONTINUES TO CONDUCT ITS OWN-MOTION REVIEW OF ALJ DECISIONS AS MANDATED BY THE BELLMON AMENDMENT WHICH WAS ENACTED IN 1980. THIS IS A RANDOM SAMPLE OF BOTH FAVORABLE AND UNFAVORABLE ALJ DECISIONS AND IS CONDUCTED TO ENSURE THAT DISABILITY CASES ARE DECIDED IN A UNIFORM, ACCURATE AND CONSISTENT MANNER ACROSS THE COUNTRY. WE BELIEVE THE BELLMON REVIEW HAS ACHIEVED THESE OBJECTIVES AND ALSO AIDS US IN IDENTIFYING AREAS WHERE DISABILITY POLICY MIGHT NEED TO BE MORE CLEARLY ARTICULATED, WHERE ADDITIONAL OR DIFFERENT KINDS OF TRAINING ARE NEEDED; AND WHERE INDIVIDUAL MISUNDERSTANDINGS NEED TO BE CLEARED UP. THE NUMBER OF BELLMON REVIEW CASES IN WHICH THE APPEALS COUNCIL REVERSED AN ALJ ALLOWANCE HAS STEADILY DECLINED FROM 18.1 PERCENT IN FY 1982 TO 12.9 PERCENT IN FY 1984. IN FY 1985, THIS LEVEL WAS 12 PERCENT.

WE BELIEVE THAT THE ENACTMENT OF S. 673 COULD ADVERSELY AFFECT THE LEVEL OF UNIFORMITY AND CONSISTENCY IN THE DISABILITY HEARINGS PROCESS THAT WE HAVE TRIED SO HARD TO ACHIEVE. THIS IS OF PARTICULAR CONCERN BECAUSE THE NATURE OF OUR WORKLOADS HAS ALSO CONTINUED TO BECOME MORE DIFFICULT TO ADJUDICATE EFFECTIVELY.

NINETY-FIVE PERCENT OF OUR ALJ HEARINGS INVOLVE DISABILITY CLAIMS. THE DISABILITY ISSUES IN THESE CASES HAVE BECOME INCREASINGLY COMPLEX NOT ONLY BECAUSE OF THE SIGNIFICANT LEGISLATIVE CHANGES MADE IN THE LAST 6 YEARS BUT ALSO BECAUSE MANY MEDICAL CONDITIONS AND FACTORS HAVE BECOME INCREASINGLY DIFFICULT TO EVALUATE. WE ARE DEEPLY CONCERNED THAT REMOVING ALJS FROM DIRECT ORGANIZATIONAL ACCESS TO SSA'S POLICY INFORMATION AND PROCESSING GUIDANCE WOULD SERIOUSLY IMPAIR OUR ABILITY TO OPERATE THE DISABILITY PROGRAM IN A UNIFORM AND CONSISTENT MANNER.

ADMINISTRATIVE DECISIONMAKING AND AGENCY ACCOUNTABILITY

FINALLY, WE BELIEVE THAT A SEPARATE ALJ CORPS IS INCONSISTENT WITH THE CONCEPT OF ADMINISTRATIVE DECISIONMAKING. IN THE DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS), ALJS HAVE THE AUTHORITY TO DECIDE HEARINGS CASES BECAUSE THE SECRETARY CANNOT PERSONALLY HEAR AND DECIDE THE VOLUME OF CASES THAT SSA HAS. AN ALJ DECISION REPRESENTS THE SECRETARY'S FINAL DECISION UNLESS THE APPEALS COUNCIL DECIDES TO REVIEW IT. IT WOULD BE INAPPROPRIATE FOR AN ALJ CORPS TOTALLY OUTSIDE THE POLICYMAKING FUNCTION IN HHS TO HAVE THE FINAL RESPONSIBILITY FOR MAKING ADJUDICATORY DECISIONS FOR THE SECRETARY. IF THE ADMINISTRATIVE HEARING PROCESS IS TO REMAIN VIABLE, THEN THE AGENCY WHICH IS ULTIMATELY ACCOUNTABLE TO CONGRESS MUST MAINTAIN ADMINISTRATIVE CONTROL OVER THE OFFICIALS TO WHOM THE AUTHORITY TO HEAR APPEALS IS DELEGATED. I MIGHT MENTION THAT THE ISSUE OF SEPARATING THE ADJUDICATORY AND POLICY-

SETTING FUNCTIONS OF FEDERAL AGENCIES IS OF GREAT CONCERN TO OTHERS IN THE FEDERAL SECTOR AND IS PRESENTLY BEING STUDIED BY THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES.

CONCLUSION

WE BELIEVE THAT OUR OBJECTIVES ARE THE SAME AS THOSE OF SENATOR HEFLIN AND THIS COMMITTEE--TO ASSURE THAT DUE PROCESS OF LAW IS PROVIDED TO CLAIMANTS IN AN ADJUDICATIVE SETTING THAT IS FREE OF PREJUDICE OR INAPPROPRIATE CONSTRAINT AND THAT FEDERAL PROGRAMS ARE ADMINISTERED UNIFORMLY, EFFICIENTLY, AND IN A COST-EFFECTIVE MANNER. WE THINK THAT WE CAN BEST MEET THESE OBJECTIVES UNDER THE PRESENT ALJ SYSTEM RATHER THAN UNDER S. 673 BECAUSE WE ENSURE ALJ INDEPENDENCE WITHIN AN EFFICIENT CASE PROCESSING SYSTEM. FURTHER, COMBINING THE ADJUDICATORY AND POLICYMAKING FUNCTIONS UNDER ONE AGENCY PERMITS US TO ADMINISTER THE NATIONAL SOCIAL SECURITY DISABILITY PROGRAM IN A UNIFORM AND CONSISTENT MANNER AND TO MAKE ADMINISTRATIVE ADJUSTMENTS TO ACCOUNT FOR CHANGING WORKLOADS.

PREPARED STATEMENT OF CONSTANCE HORNER

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

THANK YOUR FOR THIS OPPORTUNITY TO PROVIDE THE OFFICE OF PERSONNEL MANAGEMENT'S VIEWS ON S. 673, ENTITLED THE "ADMINISTRATIVE LAW JUDGE CORPS ACT."

S. 673 WOULD ESTABLISH AN INDEPENDENT FEDERAL AGENCY TO BE KNOWN AS THE ADMINISTRATIVE LAW JUDGE CORPS OF THE UNITED STATES (ALJ CORPS). TO BE THE EMPLOYING AGENCY FOR ALL ADMINISTRATIVE LAW JUDGES (ALJ'S). THIS WOULD PRESENT A DEPARTURE FROM THE CURRENT PRACTICE DATING BACK TO THE ADMINISTRATIVE PROCEDURE ACT OF 1946, WHEREBY VARIOUS GOVERNMENT DEPARTMENTS AND AGENCIES INDIVIDUALLY EMPLOY ALJ'S. IN GENERAL, ALJ'S PREPARE FOR AND PRESIDE AT FORMAL HEARINGS WHICH AGENCIES ARE REQUIRED BY STATUTE TO HOLD, FOLLOWING WHICH ALJ'S MAY BE REQUIRED TO FORWARD RECOMMENDED OR INITIAL DECISIONS TO AGENCY HEADS ON THE BASIS OF THE RECORDS THEY DEVELOP. WHERE POSSIBLE, ALJ'S SEEK TO RESOLVE CONFLICTING CLAIMS IN ADVANCE OF OR DURING THE HEARING. ALTHOUGH APPLICABLE LAW USUALLY RESERVES THE FINAL DECISION TO THE AGENCY HEAD, IT IS NOT UNCOMMON FOR DECISIONS OF ALJ'S TO BE ADOPTED IN WHOLE BY THE SECRETARIES, DIRECTORS, COMMISSIONS, AND OTHER AGENCY DECISION-MAKERS, SOLE OR COLLEGIAL, TO WHOM ALJ'S REPORT. ONCE AGENCY DECISIONS BECOME FINAL, THEY TYPICALLY MAY BE APPEALED TO THE FEDERAL DISTRICT COURTS, OR IN SOME CASES, DIRECTLY TO THE UNITED STATES COURTS OF APPEALS.

THE WORKLOAD FOR ALJ'S AS A GROUP INCLUDES CASES INVOLVING SUCH TECHNICAL SUBJECT AREAS AS ANTI-TRUST, ADMIRALTY, TRANSPORTATION, INTERSTATE AND INTERNATIONAL TRADE, ENERGY, COMMUNICATIONS, LABOR-MANAGEMENT RELATIONS, FOOD AND DRUGS, HEALTH AND SAFETY, ADVERTISING, SECURITIES AND COMMODITIES MARKETS, SOCIAL SECURITY, WORKER'S COMPENSATION AND OTHER COMPENSATION CLAIMS, AND ENVIRONMENTAL PROTECTION. THIS

LIST, ALTHOUGH NOT EXHAUSTIVE, CLEARLY DEMONSTRATES THE ESSENTIAL FUNCTION OF ALJ'S: TO DEVELOP, IN AS REGULAR, IMPARTIAL, AND EFFICIENT A MANNER AS POSSIBLE, A FACTUAL RECORD RELATIVE TO A MATTER REQUIRING TECHNICAL EXPERTISE, AS OPPOSED TO COMMON JUDGMENT, SO THAT AGENCY HEADS OR OTHER DECISION-MAKERS AT THE POLICY MAKING LEVEL MAY MAKE AN APPROPRIATELY INFORMED ULTIMATE DECISION. TODAY, THERE ARE APPROXIMATELY 1,100 ALJ'S EMPLOYED BY 29 DEPARTMENTS AND AGENCIES. BENEFIT CLAIMS UNDER THE SOCIAL SECURITY ACT AND ACCUSATORY (CIVIL) ENFORCEMENT ACTIONS CONSTITUTE THE BULK OF THE CASES HEARD BY ALJ'S.

THE ADMINISTRATIVE PROCEDURE ACT REQUIRED A MERIT SELECTION SYSTEM FOR ALJ'S. IT ALSO PROVIDED STATUTORY PROTECTION OF AN ALJ'S INDEPENDENCE AND IMPARTIALITY BY PLACING EXAMINATION, PAY-SETTING, AND REMOVAL AUTHORITY OUTSIDE THE EMPLOYING AGENCY. THE OFFICE OF PERSONNEL MANAGEMENT--AND OUR PREDECESSOR AGENCY, THE CIVIL SERVICE COMMISSION--HAS RECRUITED, EXAMINED, AND SELECTED CANDIDATES AND MAINTAINED A REGISTER OF ALJ ELIGIBLES.

EMPLOYING AGENCIES MUST APPOINT ALJ'S FROM THE OPM REGISTER. ALTHOUGH ALJ'S ARE CONSIDERED AGENCY PERSONNEL AND ARE SUPPORTED BY AGENCY RESOURCES, THEIR CLASSIFICATION AND PAY LEVELS UNDER THE GENERAL SCHEDULE MUST BE DETERMINED BY OPM, INDEPENDENT OF AGENCY RECOMMENDATIONS OR RATINGS. EXCEPT IN A REDUCTION-IN-FORCE, OR FOR REASONS OF NATIONAL SECURITY, ALJ'S CANNOT BE DISCIPLINED OR REMOVED BY EMPLOYING AGENCIES UNLESS THEY ARE GIVEN THE OPPORTUNITY FOR A PRIOR HEARING, ON-THE-RECORD, BEFORE THE MERIT SYSTEMS PROTECTION BOARD (MSPB), WITH THE AGENCY BEARING THE BURDEN OF ESTABLISHING GOOD CAUSE FOR ITS ACTION.

S. 673 PROPOSES TO HOUSE ALL ALJ'S IN AN INDEPENDENT AGENCY. AN ADMINISTRATIVE AND POLICYMAKING COUNCIL OF THE CORPS, CONSISTING OF A CHIEF JUDGE APPOINTED FOR A FIVE-YEAR TERM AND AN INITIAL GROUP OF SEVEN DIVISION CHIEF JUDGES WITH TERMS OF OFFICE VARYING FROM THREE TO FIVE YEARS, WOULD BE

APPOINTED BY THE PRESIDENT, WITH THE ADVICE AND CONSENT OF THE SENATE, FROM CANDIDATES RECOMMENDED BY A JUDICIAL NOMINATION COMMISSION ESTABLISHED BY THE BILL. AS THE INITIAL DIVISIONAL APPOINTMENTS EXPIRE, THE CHIEF JUDGE WOULD APPOINT SUBSEQUENT DIVISION CHIEF JUDGES FOR FIVE-YEAR TERMS FROM CANDIDATES THE JUDICIAL NOMINATION COMMISSION RECOMMENDS AND SUBJECT TO APPROVAL BY THE COUNCIL. THE COUNCIL WOULD ALSO BE EMPOWERED TO CHANGE THE NUMBER AND JURISDICTIONS OF THE ORIGINAL SEVEN DIVISIONS IN THE CORPS, SUBJECT TO A STATUTORY REQUIREMENT FOR A MINIMUM OF FOUR AND A MAXIMUM OF TEN DIVISIONS. ALJ'S, OTHER THAN THE CHIEF JUDGE AND DIVISION CHIEF JUDGES, WOULD BE APPOINTED BY THE CORPS COUNCIL FROM A REGISTER OF ELIGIBLES MAINTAINED BY OPM.

MEMBERS OF THE ALJ CORPS COULD BE REMOVED ONLY FOR GOOD CAUSE UPON A HEARING BEFORE THE MERIT SYSTEMS PROTECTION BOARD. THEY WOULD BE PAID UNDER THE EXECUTIVE SCHEDULE, WITH THE CHIEF JUDGE AT LEVEL III, THE DIVISION CHIEF JUDGES AT LEVEL IV, AND ALL OTHER ALJ'S AT LEVEL V. EXISTING STATUTORY PROVISIONS FOR AGENCY REVIEW OF AN ALJ'S INITIAL OR RECOMMENDED DECISION WOULD BE CONTINUED, BUT THE NEW ALJ CORPS WOULD BE REQUIRED TO STUDY DIFFERENT APPROACHES TO AGENCY REVIEW FOR TWO YEARS AND REPORT FINDINGS AND RECOMMENDATIONS TO THE PRESIDENT AND CONGRESS.

THE OFFICE OF PERSONNEL MANAGEMENT OPPOSES ENACTMENT OF S. 673.

THE CONCEPT OF A CENTRALIZED CORPS OF ALJ'S OR AN ADMINISTRATIVE TRIAL COURT WAS PROPOSED MORE THAN THIRTY YEARS AGO, IN 1955, BY THE SECOND HOOVER COMMISSION ON THE ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT. THEN, AS NOW, THE PRINCIPAL REASON ADVANCED IN SUPPORT OF THE PROPOSAL WAS THAT THE ADJUDICATIVE FUNCTIONS OF ADMINISTRATIVE AGENCIES NEEDED TO BE SEPARATED FROM THEIR OTHER FUNCTIONS IN ORDER TO ASSURE PROTECTION OF PRIVATE CITIZENS' RIGHTS. WHEN A

HEARING CONCERNING THE ACTIVITIES OF AN ADMINISTRATIVE AGENCY ARE CONDUCTED BY SOMEONE EMPLOYED BY THAT AGENCY, IT WAS ARGUED, A PRIVATE CITIZEN COULD NOT BE ASSURED OF AN INDEPENDENT HEARING BEFORE AN IMPARTIAL JUDGE WHO WOULD OBJECTIVELY CONSIDER HIS DISPUTE WITH THE GOVERNMENT. A SECOND REASON THAT HAS FREQUENTLY BEEN ADVANCED IN SUPPORT OF ESTABLISHMENT OF AN ALJ CORPS IS THAT IT WOULD BRING ADMINISTRATIVE EFFICIENCY TO THE MANAGEMENT OF ALJ'S AND THEIR CASELOADS.

OPM, OF COURSE, SUPPORTS THE GOAL OF HEARINGS CONDUCTED UNDER UNIFORM RULES OF PROCEDURE BEFORE IMPARTIAL FACT-FINDERS IN AGENCY RULE-MAKING AND ADJUDICATIVE ACTIVITIES. WE DO NOT AGREE AT ALL, HOWEVER, THAT EXISTING ADMINISTRATIVE PROCESSES BEFORE ALJ'S IN ANY WAY FAIL TO PROVIDE IMPARTIAL HEARINGS. WHILE ALJ'S MAY APPEAR TO SOME PEOPLE TO LACK INDEPENDENCE BECAUSE THEY ARE AGENCY EMPLOYEES AND ARE HOUSED IN AGENCY FACILITIES, THIS IS NOT A MATTER OF SUBSTANCE. ALLEGATIONS OF AGENCY INTERFERENCE IN INDEPENDENT DECISIONMAKING BY ALJ'S HAVE BEEN MADE FROM TIME TO TIME. HOWEVER, THERE IS NO EVIDENCE THAT ANY SUCH INTERFERENCE HAS ACTUALLY OCCURRED. ON THE CONTRARY, EVERY EXAMINATION OF THE REALITY OF THE ADMINISTRATIVE DECISION PROCESS HAS SHOWN US THAT AGENCY HEADS ACTUALLY DO RESPECT THE FACTFINDING INDEPENDENCE OF AGENCY ALJ'S IN ORDER TO COMPLY WITH STATUTORY PROVISIONS ENTITLING PARTIES WHO APPEAR BEFORE THEM TO FULL, FAIR, AND IMPARTIAL HEARINGS. THE CURRENT ARRANGEMENTS FOR (1) OPM RECRUITMENT, EXAMINATION, AND CERTIFICATION OF ALJ'S, (2) INDEPENDENT OPM CLASSIFICATION AND PAY LEVEL DETERMINATIONS, AND (3) A PRE-TERMINATION HEARING BEFORE THE MSPB WHEN ALJ REMOVAL OR DISCIPLINE IS CONTEMPLATED, ADEQUATELY PROTECT THE INTEGRITY OF ALJ'S EMPLOYED IN THE VARIOUS AGENCIES.

THE CENTRALIZED ALJ CORPS ENVISIONED BY S. 673 RAISES SEVERAL UNANSWERED QUESTIONS ABOUT EFFICIENT MANAGEMENT OF AGENCY PROGRAMS THAT ARE NOT RAISED BY THE PRESENT SYSTEM. WOULD ALJ TECHNICAL EXPERTISE IN AGENCY PROGRAMS BE DILUTED

OVER TIME? IF SO, IS IT COMMON JUDGMENT, RATHER THAN PROGRAM KNOWLEDGE, THAT WE SEEK IN THE ALJ FUNCTION? WOULD CENTRALIZED RULES OF PROCEDURE FOR CONDUCTING HEARINGS ASSURE THE SPEEDY DISPOSITION OF ALL KINDS OF CASES? WOULD AGENCIES BE ABLE TO RELY ON TIMELY PROCESSING OF HEARING REQUESTS? HOW WOULD THE ALJ CORPS CHOOSE AMONG COMPETING DEMANDS FOR TIMELY HEARINGS FROM THE VARIOUS AGENCIES? IN OTHER WORDS, EXACTLY HOW WOULD THE ALJ CORPS APPROACH RESULT IN BETTER MANAGEMENT OF THE HEARING WORKLOAD THAT MUST BE MANAGED AS LONG AS HEARINGS ARE REQUIRED TO BE HELD? BECAUSE OF QUESTIONS LIKE THESE, AGENCY HEADS MAY BE RELUCTANT TO ASSIGN CASES FOR HEARING BEFORE THE CORPS AND MAY CHOOSE, INSTEAD, TO EXERCISE THEIR PREROGATIVES TO HOLD HEARINGS THEMSELVES.

THE PROVISIONS OF S. 673 PROPOSING TO PAY ALJ'S UNDER THE EXECUTIVE SCHEDULE ARE PARTICULARLY UNREASONABLE. IT WOULD BE CLEARLY INAPPROPRIATE TO COMPENSATE ALJ'S GENERALLY UNDER THE EXECUTIVE SCHEDULE SINCE THAT SCHEDULE, WITH A HANDFUL OF EXCEPTIONS, IS INTENDED FOR TOP MANAGEMENT POSITIONS FILLED BY PRESIDENTIAL APPOINTMENT AND SUBJECT TO SENATE CONFIRMATION. ONLY THE CHIEF JUDGE AND DIVISION CHIEF JUDGES WOULD MEET THIS CRITERION.

FINALLY, WE MUST NOTE THAT THE LAST SENTENCE OF THE NEW SECTION 5 U.S.C. 567(a) PROPOSED BY S. 673 WOULD CREATE AN EXCEPTION TO THE VETERANS' PREFERENCE ACT WITH RESPECT TO ALJ APPOINTMENTS. GENERALLY, IF A PREFERENCE ELIGIBLE IS AMONG THE HIGHEST THREE ELIGIBLE CANDIDATES CERTIFIED FROM A CIVIL SERVICE REGISTER FOR A VACANCY IN THE COMPETITIVE SERVICE, THE EMPLOYING AGENCY IS PRECLUDED FROM APPOINTING ANOTHER INDIVIDUAL WHO IS NOT A PREFERENCE ELIGIBLE. FOR EACH ALJ VACANCY, HOWEVER, S. 673 WOULD REQUIRE OPM TO CERTIFY AT LEAST FIVE NAMES TO THE CORPS COUNCIL AND WOULD PERMIT SELECTION WITHOUT REGARD TO VETERAN STATUS. WE DO NOT THINK THAT THE IMPACT OF VETERANS' PREFERENCE ON THE ALJ REGISTER IS, OR SHOULD BE, ANY GREATER OR ANY LESS THAN ITS

IMPACT ON ANY OTHER CIVIL SERVICE REGISTER. THE "RULE OF THREE" GIVES CIVIL SERVICE HIRING PREFERENCE TO VETERANS WHO HAVE SERVED THEIR COUNTRY WELL. WE ARE STRONGLY OPPOSED TO ANY WEAKENING OF THE VETERANS' PREFERENCE ACT.

IN SUMMARY, OPM CONCLUDES THAT THE PRESENT ADMINISTRATIVE PROCEDURES AFFORD THE PROPER BALANCE BETWEEN DECISIONAL INDEPENDENCE AND EFFICIENT ADMINISTRATION. SOME MAY BE DISSATISFIED WITH THE KINDS OF DECISIONS THAT OUR SYSTEM CALLS UPON ALJ'S TO MAKE, OR WITH THE FACT THAT THE GOVERNMENT IS EXERCISING A PARTICULAR REGULATORY OR ADJUDICATIVE AUTHORITY AT ALL. HOWEVER, AGENCIES MUST HAVE THE AUTHORITY TO DISCHARGE THEIR MISSIONS CONSISTENT WITH THE LAW AND WITH EXECUTIVE BRANCH POLICY MADE IN PURSUANCE OF THE LAW, AND AGENCY ADMINISTRATIVE CONTROL OVER THE ALJ FUNCTION IS A NECESSARY PART OF THIS AUTHORITY. THE OFFICE OF PERSONNEL MANAGEMENT THEREFORE RESPECTFULLY OPPOSES FURTHER CONSIDERATION OF S. 673 AND OPPOSES THE ESTABLISHMENT OF A CENTRALIZED CORPS OF ALJ'S.

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